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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRYSLER CORPORATION,

Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the National Traffic and Motor Vehicle Safety Act, which expressly preempts states from establishing any safety standard that is not identical to Federal Motor Vehicle Safety Standards governing the same aspect of vehicle performance, 15 U.S.C. § 1392(d), precludes individual juries in product liability actions from adopting safety standards under state common law that are not identical to applicable Federal Motor Vehicle Safety Standards?

2. Whether the objectives of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.*, to improve vehicle safety and establish national uniformity in vehicle safety standards are frustrated when a state permits individual juries to adopt safety standards in common law product liability actions without requiring proof that such standards will improve overall vehicle crashworthiness and will comply with mandatory Federal Motor Vehicle Safety Standards?

3. Whether a state common-law standard for assessing liability for automotive designs that does not require plaintiffs to prove that their proposed alternative designs will improve overall vehicle crashworthiness and will comply with mandatory Federal Motor Vehicle Safety Standards poses an unconstitutional burden on interstate commerce by promoting adoption of inconsistent and conflicting safety standards by individual juries in various states?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Chrysler Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (the "Court of Appeals") filed on September 11, 1980.

Opinions Below

The opinion of the Court of Appeals (the "Opinion") is unreported and appears in Appendix A. The Order of the Court of Appeals denying Chrysler's Petition for Rehearing En Banc, dated October 17, 1980, appears in Appendix C.

Jurisdiction

The judgment of the Court of Appeals (Appendix B) was filed on September 11, 1980. A timely Petition for Rehearing En Banc was denied on October 17, 1980. This Petition for Certiorari was filed within ninety days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Federal Constitutional Provisions and Statutes Involved

The questions presented in this petition involve the Supremacy and Commerce Clauses of the United States Constitution, art. VI, cl. 2 and art. I, § 8, cl. 3, respectively; and the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, tit. I. § 107, 80 Stat. 718, *codified in* 15 U.S.C. § 1381 *et seq.* (1976) and regulations promulgated thereunder. The Constitutional provisions are set out in Appendix H and material portions of the Act are reproduced in Appendix D. Material portions of the regulations are reproduced in Appendix E and Appendix F.

Statement of the Case

The Federal Regulatory Scheme. The National Traffic and Motor Vehicle Safety Act of 1966 (the "Act") established a comprehensive federal regulatory scheme governing the formulation and maintenance of Federal Motor Vehicle Safety Standards. 15 U.S.C. § 1381 *et seq.* A new automobile may not be sold or even manufactured for sale unless it complies with these standards. 15 U.S.C. § 1397(a)(1)(A). Among the regulations promulgated by the National Traffic and Highway Safety Administration ("NHTSA") are standards designed to protect

against occupant injury in side-impact collisions. *See* 49 C.F.R. § 571.208; 49 C.F.R. § 571.214. The Act contains a broad explicit preemption provision, which precludes states from adopting safety standards that are "not identical" to federal standards regulating the "same aspect of performance." 15 U.S.C. § 1392(d). The Act also provides that "compliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c).

The District Court Proceeding. On September 7, 1974, respondent Richard F. Dawson, a police officer, was seriously injured when he lost control of a 1974 Dodge Monaco patrol car manufactured by petitioner Chrysler Corporation. The vehicle slid off a rain-soaked highway and crashed laterally into a steel pole, which intruded through the side of the automobile.

An action, alleging that Mr. Dawson's injuries were enhanced because of a defect in the vehicle's design, was initiated in Pennsylvania state court and was removed to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441(a) on the ground of diversity of citizenship. Thereafter, the action was transferred to the District Court for the District of New Jersey pursuant to 28 U.S.C. § 1404(a). The case was tried under the substantive law of New Jersey before a jury.

Respondents contended that the Dodge Monaco should have been designed in such a manner as to permit less intrusion by the pole into the interior of the vehicle. They alleged that the vehicle was defectively designed because it lacked a continuous frame extending through the perimeter area of the vehicle between the front and rear seats and reinforcing frame cross-members running between the vertical body posts located on either side of the car.

The steel required for the proposed alternative design would have added 200 to 250 pounds to the weight of the vehicle. Opinion at 6a. Respondents' expert witnesses testified that their alternative frame design would be safer for the driver in a side-impact collision with a stationary object, such as occurred in this case, and that the alternative design was technologically feasible at the time the vehicle was manufactured. *Id.* Respondents were unable to show that their proposed design had in fact been used by any automobile manufacturer.

Petitioner contended that respondents' burden of showing a practicable, safer design[1] required that they offer evidence that the re-designed vehicle would comply with mandatory Federal Motor Vehicle Safety Standards and would be as safe as petitioner's design in other types of accidents.

Petitioner established, without contradiction, that in frontal collisions, which occur far more frequently than side-impact collisions, "it is desirable to have a car designed to collapse upon impact because the deformation would absorb much of the shock of the collision, and divert the force of deceleration away from the vehicle's passengers." *Id.* at 26a. As the court found, respondents' expert witnesses conceded that "the heavier and more rigid an automobile, the less able it is to absorb energy upon impact with a fixed object, and therefore the major force of an accident might be transmitted to the passengers." *Id.* at 17a. Yet, none of respondents' expert witnesses considered how

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[1] New Jersey law requires that a plaintiff seeking to establish the defectiveness of a product design in a "crashworthiness" case "must offer proof of an alternative, safer design, practicable under the circumstances." *Huddell* v. *Levin*, 537 F.2d 726, 737 (3d Cir. 1976) (applying New Jersey law).

the more rigid frame design would affect the vehicle's crashworthiness in any accident other than a side-impact collision with a stationary object.[2]

In addition, respondents failed to offer any evidence that a vehicle manufactured according to their proposed design would comply with the mandatory Federal Motor Vehicle Safety Standards. Unquestionably, the vehicle as designed by Chrysler complied fully with all federal safety standards. *Id.* at 6a.

The jury returned a verdict in favor of respondents, finding, in answer to special interrogatories, that the structure of the Dodge Monaco was defective and unreasonably dangerous; that Mr. Dawson suffered more severe injuries than if Chrysler had used respondents' alternative design; and that Chrysler's design was the proximate cause of his enhanced injuries. *Id.* at 7a.

The Court of Appeals' Opinion. On appeal to the United States Court of Appeals for the Third Circuit, petitioner sought reversal of the judgment in that, *inter alia*, respondents offered no evidence that their proposed design would (1) conform to existing Federal Motor Vehicle Safety Standards, and (2) be as safe as petitioner's design when other collision situations were considered.[3]

In responding to petitioner's arguments, the Court of Appeals acknowledged a "troubling public policy dilemma

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[2] *See, e.g.*, testimony of Dr. Steven C. Batterman, Court of Appeals Appendix for Appellant, p. 1755a, lines 1-19, pp. 1901a, line 2 to 1903a, line 2, reproduced in Appendix G.

[3] Chrysler also presented several arguments challenging the adequacy of respondents' evidence in various respects. These were rejected by the Court of Appeals and are not raised in this Petition since they do not involve federal questions.

—namely, that under existing federal law individual juries in the various states are permitted, in effect, to establish national automobile safety standards." The court found that:

> The result of such an arrangement, predictably, is not only incoherence in the safety requirements set by disparate juries, but also the possibility that a standard established by a jury in a particular case will conflict with other policies regarding the economics of the automobile industry as well as energy conservation programs.

Id. at 4a.

By way of illustration, the court noted:

> while the jury found Chrysler liable for not producing a rigid enough vehicular frame, a factfinder in another case might well hold the manufacturer liable for producing a frame that is too rigid. Yet, as pointed out at trial, in certain types of accidents—head-on collisions—it is desirable to have a car designed to collapse upon impact because the deformation would absorb much of the shock of the collision, and divert the force of deceleration away from the vehicle's passengers. In effect, this permits individual juries applying varying laws in different jurisdictions to set nation-wide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents.

Id. at 25a-26a.

While recognizing that "it is not at all clear that the present arrangement of permitting individual juries, under varying standards of liability, to impose this obligation on manufacturers is fair or efficient," the Court of Appeals "decline[d] . . . to do anything in this regard except to bring the problem to the attention of the legislative branch." *Id.* at 27a. Consequently, the court, "with uneasiness regarding the consequences of [its] decision," affirmed the judgment of the District Court. *Id.* at 25a.

On October 17, 1980, the Court of Appeals denied Chrysler's Petition for Rehearing En Banc.

Reasons for Granting the Writ

The writ should be granted because this case raises important issues of federal law which have not been, but should be, settled by this Court. These issues are, as the Court of Appeals emphasized, of overriding social importance, involving significant and troubling national concerns of economic and public policy. *See* Opinion at 3a.

The Court of Appeals' express disenchantment with a system that permits individual juries in different jurisdictions to set nationwide automobile safety standards, while certainly well-founded, is an insufficient response to the issues presented. The Court of Appeals' failure to recognize that courts are empowered to prevent the establishment of conflicting vehicle safety standards by juries stemmed from its notion that under the Act "states are free . . . to create various standards of liability for automobile manufacturers with respect to design and structure. . . ." *Id.* at 25a. This conclusion was drawn from Section 1397(c) of the Act, which provides that compliance

with federal standards does not confer a blanket exemption from state common law liability. However, the conclusion completely ignores the effect of Section 1392(d) of the Act, which prohibits a system of state-by-state formulation of safety standards where the state standards are not shown to be identical with federal standards governing the same aspect of performance.

Although the Act does not shield manufacturers from liability at common law, a fair reading of the statute mandates that courts, when they do enter this sphere of comprehensive federal law, apply and interpret state common-law standards of liability in such a way as to effectuate rather than subvert the announced Congressional goals of improving motor vehicle safety and creating uniform national performance standards. This the Court of Appeals failed to do—by permitting respondents to establish a *prima facie* case of automotive design defect by proposing an alternative design that would allegedly improve only a single feature of vehicle performance (*i.e.*, protection in side-impact collisions with a stationary object) without requiring the presentation of any proof of (1) the effect of the proposed design change on crashworthiness in other types of accidents and (2) the compatibility of the design change with existing mandatory Federal Motor Vehicle Safety Standards.

The alternative frame design mandated by the jury in this case constitutes a state safety standard that is preempted by Section 1392(d) of the Act because it is "not identical" to applicable Federal Motor Vehicle Safety Standards governing the "same aspect of performance." Moreover, as applied by the Court of Appeals, the New Jersey common-law standard for determining vehicle safety frustrates the important Congressional objectives of im-

proving vehicle safety and creating uniform national performance standards. This approach to imposing common-law liability is inconsistent with the express terms of the Act as well as the integrated regulatory scheme created thereunder, and thus offends the notion of federal primacy embodied in the Supremacy Clause. In addition, it imposes an undue burden on interstate commerce by promoting the proliferation of incompatible jury-made design standards.

I. As applied by the Court of Appeals, New Jersey's common-law standard for determining vehicle safety, and the state motor vehicle safety standard generated thereby, violate the Supremacy Clause.

A federal statute or regulation will displace state law if there is an explicit preemption provision in the statute or regulation, if a preemptive intent is implicit in the federal program, or if there is a dominant federal interest in uniformity. A state law will also be held invalid if it is inconsistent with governing federal standards or if it frustrates the purposes and objectives of Congress in enacting the federal program. *See Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, *rehearing denied*, 431 U.S. 925 (1977).

The language of the Act and its legislative history demonstrate that Congress envisioned a comprehensive and uniform federal regulatory scheme designed to promote increased safety for persons involved in automobile accidents. The Act seeks to achieve improved vehicle safety by placing "primary responsibility" for setting safety standards "squarely upon the Federal Government." S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966]

U.S. Code Cong. & Ad. News 2709, 2712. The expressed goal of the federal legislative scheme is to establish "motor vehicle safety standards [that will] be not only strong and adequately enforced, but . . . uniform throughout the country." *Id.* at 2720. *See Truck Safety Equipment Institute* v. *Kane,* 466 F. Supp. 1242 (M.D. Pa. 1979). The Act, in clear, unequivocal language, seeks to achieve this objective by prohibiting states from establishing or maintaining "any safety standard" that is "not identical" to federal standards "applicable to the same aspect of performance."[4] 15 U.S.C. § 1392(d). This preemption clause is exceptionally broad and is written in the "strongest possible terms"; it prohibits any state standard relating to the same aspect of performance—whether that state standard is higher or lower than the federal standard. *Chrysler Corp.* v. *Tofany,* 419 F.2d 499, 512 (2d Cir. 1969) (Friendly, J., concurring). The House Report emphasized that subsection 1392(d) "is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than a multiplicity of diverse standards." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966).

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[4] In only one circumstance—where a state or political subdivision thereof procures vehicles for its own use—may standards different from federal vehicle safety standards be established. 15 U.S.C. § 1392(d). Although the Dodge Monaco driven by Mr. Dawson was used as a police patrol car, the local police department did not impose any special requirements for frame design or occupant protection as part of its procurement specifications for the vehicle. Court of Appeals Appendix for Appellant, Vol. XII, pp. 3511a, 3560a.

A. Preemption.

As the Court of Appeals found, the jury's determination of liability in this case has the practical effect of establishing a state motor vehicle safety standard. *See* Opinion at 25a-26a. That finding is consistent with this Court's recognition that verdicts in common-law actions can be functionally equivalent to formal regulatory activity:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236, 247 (1959) (citation omitted). *See also, Nashville Chattanooga & St. Louis Railway* v. *Browning*, 310 U.S. 362, 366-70 (1940); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526, *rehearing denied*, 431 U.S. 925 (1977).

The state motor vehicle safety standard established in this case—a heavier and more rigid frame design—is "not identical" to federal standards governing the "same aspect of performance" and is therefore expressly preempted by Section 1392(d) of the Act.

Federal Motor Vehicle Safety Standards 208 and 214 govern the precise aspect of vehicle performance at issue in this case—occupant protection in side-impact collisions.[5]

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[5] Since the alternative design offered by respondents would significantly increase the weight of the vehicle, it may also implicate 49 C.F.R. § 571.105, dealing with hydraulic brake system standards, and 49 C.F.R. § 571.110, dealing with tire selection and rim standards. It may also conflict with federal fuel efficiency objectives. Opinion at 26a.

49 C.F.R. §§ 571.208, 571.214. Standard 208, entitled "Occupant crash protection," is designed "to reduce the number of deaths of vehicle occupants, and the severity of injuries" in frontal, lateral (side-impact), and rollover crashes by "specifying vehicle crashworthiness requirements," including passenger restraint systems. Standard 214 seeks to "minimize the safety hazard caused by intrusion into the passenger compartment in a side-impact accident" by specifying side door strength requirements.

The fact that there is no federal standard expressly regulating the rigidity of vehicle frames does not mean that there is no federal standard governing the "aspect of performance" that is involved in this case. The "aspect of performance" at issue—vehicle crashworthiness in side-impact collisions—could have been regulated in a number of different ways. The decision to deal with side-impact safety in Standards 208 and 214 by requiring passenger restraint systems and by regulating side door strength, in light of NHTSA's policy pronouncements, implicitly reflects a judgment against increasing vehicle frame rigidity.[6]

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[6] The leading cause of traffic fatalities and injuries is front-end collisions, followed by side-impact collisions. In formulating standards aimed at improving safety in side-impact crashes, NHTSA necessarily must and does in fact consider the effect that structural modifications to the side of a vehicle "might have on vehicle integrity in frontal and front-angular crashes." *See, e.g.*, 45 Fed. Reg. 17,015, 17,017 (1980). *See also* 44 Fed. Reg. 33,444 (1979). As the Court of Appeals recognized, a frame designed to ameliorate injuries in side crashes by increasing rigidity could well have the effect of worsening injuries in frontal collisions by reducing the vehicle's ability to absorb energy on impact. Opinion at 26a. Moreover, 84% of all side-impact collisions are intersection-type

(Footnote continued on following page)

This federal policy determination not to use heavier, more rigid frame designs to improve protection in such collisions is entitled to preemptive effect: "[W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," a state cannot enact such a

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(Footnote continued from preceding page)

collisions where one vehicle is struck by another, while only 16% of side-impact collisions are single-vehicle collisions with a stationary object, such as occurred in this case. *See* 44 Fed. Reg. 70,204, 70,205 (1979). NHTSA has found that "a side structure that ameliorates the effects of impacts with vertical fixed objects," such as the pole in this case, would not necessarily reduce injuries in the more common multi-vehicle side-impact collisions, 44 Fed. Reg. at 70,205-06, where bumper structures of one vehicle usually intrude into the occupant compartment of the other vehicle on a plane above the level of the frame. On the other hand, "designs that reduce the effect of bumper intrusion would also improve the safety of occupants in vehicles striking a fixed vertical object." *Id.* NHTSA has also found that if its "standards require a substantial strengthening of vehicle frames, the aggressivity of the vehicles is increased," 45 Fed. Reg. 22,044, 22,045 (1980), and the risk to occupants of small automobiles is considerably heightened. 44 Fed. Reg. 45,426 (1979). In rejecting a strengthening of the structure of certain multi-purpose passenger vehicles that would result in increased rigidity and weight of the vehicles, NHTSA has noted:

> [T]he slight additional safety that is created for the occupants of the heavier vehicles will come at the expense of occupants of lighter vehicles that they impact. Since occupants of heavier vehicles are already safer than occupants of lighter vehicles in multi-vehicle collisions, compliance with safety standards by heavier vehicles in a manner that lessens the safety of occupants of lighter vehicles impacted by them appears not to be justified.

44 Fed. Reg. 45,426 (1979).

regulation under its police power. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767, 774 (1947). *Accord, Ray* v. *Atlantic Richfield Co., supra,* 435 U.S. at 178.

Indeed, NHTSA itself has specifically rejected the position that "any mode of design or performance that is not expressly dealt with in [a] Federal Standard is open to regulation by the states." As NHTSA has observed:

> Such a position is impractical, where the Agency's intent is to have a comprehensive, uniform regulation in a given area. . . . Congress clearly intended NHTSA to establish a single set of uniform standards to which manufacturers must comply, and that intent would tend to be defeated by [such a conclusion]. *Federal regulation has a negative as well as a positive aspect; in determining that there should be certain requirements in an area, we also are deciding against imposing others.*

Opinion Letter from the Office of Chief Counsel of the National Highway and Traffic Safety Administration, dated November 8, 1973 (emphasis supplied).

Section 1397(c) of the Act, which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law," does not preclude a finding that the state safety standard created by the jury is preempted by the Act and accompanying regulations "under the circumstances of this particular case." *See Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941). As this Court has emphasized, in enforcing the Supremacy Clause consideration must be given to "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones* v. *Rath Packing Co.,*

430 U.S. at 526. Congress, in promulgating § 1397(c), merely indicated that compliance with any federal safety standard would not *per se* be a defense to a common-law action. Sections 1392(d) and 1397(c) must be construed *in pari materia;* a state may impose common-law liability in an automotive design defect case but in so doing it may not adopt a safety standard that is inconsistent with federal standards applicable to the same aspect of performance.[7]

It would surely defeat the purposes of the Act to allow juries, which are ill-equipped to design automobiles under any circumstances, to adopt safety standards that state administrative agencies or legislatures, with extensive technical support services at their disposal, may not promulgate. The practical considerations that justify a restraint on the standard-promulgating powers of state agencies are even more persuasive with respect to the need for subordinating the design preferences of individual juries to the priority-setting authority of the federal government.

A fair reading of the Act contemplates a system of common-law adjudication in which state standards of vehicle safety created through findings of liability must at least be shown to conform to the federal standards. Thus, a proper interpretation of Section 1397(c), in light of the express language of the Act and its legislative history, is that Congress did not intend to allow common-law juries to adopt alternative designs that have not been shown to comply with the safety standards established by NHTSA.

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[7] Such a construction of these provisions is fully consistent with this Court's approach to reconciling federal and state regulatory interests. *See Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960).

B. Frustration of Congressional Purpose.

Even if the explicit preemption provisions of § 1392(d) are inapplicable to a given situation, so that states are free to develop safety standards under § 1397(c), it would nevertheless be true that those state standards could not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

As previously shown, the National Traffic and Motor Vehicle Safety Act has a dual purpose: (1) reducing traffic accidents and resulting deaths and injuries, and (2) establishing uniform national vehicle safety standards. As applied by the Court of Appeals, the judicial standard used by New Jersey to evaluate vehicle safety undermines NHTSA's approach to promoting vehicle safety and threatens national uniformity of automotive regulation.

1. *The Federal Concept of Crashworthiness.* NHTSA's approach to promoting vehicle crashworthiness recognizes the interrelated nature of the risks associated with various kinds of automobile collision situations. NHTSA's comprehensive set of performance standards takes into account the fact that safeguards designed to reduce injuries in one type of collision may exacerbate injuries in another type of collision and that, consequently, requirements for increasing occupant safety must be well-coordinated. In the federal scheme, *overall* crashworthiness is determinative of vehicle safety. Reliance on isolated structural features (*e.g.,* particular frame designs) as they may perform in one crash situation (*e.g.,* side-impact collisions with stationary objects) has been rejected by NHTSA in favor of a balanced, integrated approach to crashworthiness based on maximizing overall vehicle safety when all likely colli-

sion situations are considered. *See, e.g.*, 44 Fed. Reg. 24,591, 24,594.

The jury's finding in the instant case that petitioner's design was defective was based exclusively on evidence relating to an alternative, safer design for one specific type of risk alone. This method of developing and applying a vehicle safety standard skews the integrated concept of crashworthiness adopted by NHTSA and thereby institutionalizes a mode of analysis that not only permits, but also promotes, the establishment of state safety standards that contradict the circumspect, aggregative approach to vehicle safety adopted by the federal government. This common-law perspective is myopic in that it allows plaintiffs in product liability actions to succeed on their claims without presenting evidence of the overall safety of their alternative designs and without demonstrating the compatibility of their alternative designs with federal performance standards and safety objectives.

2. *National Uniformity.* In determining whether state regulation conflicts with or frustrates the purpose of a federal regulatory scheme, this Court has frequently considered the need for national uniformity. Where uniformity is not desirable or necessary, there is more leeway for state regulation. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). On the other hand, even in the absence of an express preemption provision, state legislation must give way where national uniformity is an important part of the federal program. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

Clearly, a common-law criterion for determining product safety that permits design standards to be created without proof of their effect on crashworthiness in other kinds

of accidents and without proof that they comply with Federal Motor Vehicle Safety Standards invites the formulation and application of multiple and potentially inconsistent standards that prevent the uniformity Congress sought to achieve through the Act. *Cf. Garner* v. *Teamsters, Chauffeurs & Helpers Local Union,* 346 U.S. 485, 490-91 (1953) ("a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law").

II. As applied by the Court of Appeals, New Jersey's common-law standard for determining vehicle safety promotes adoption of inconsistent and conflicting design standards and poses an undue burden on interstate commerce.

The common-law standard for determining vehicle safety, as applied by the Court of Appeals, and the resulting *de facto* design standard adopted by the jury pose an undue burden on interstate commerce. Substantial fragmentation of safety standards is likely to result from the approach to common-law liability approved in this case. Because individual juries will be permitted to focus on one isolated design element, without having to consider the safety of the vehicle as a whole, conflicting design standards are inevitable—particularly as to those technologically integrated elements of performance that involve a balancing of competing safety objectives.

The Court of Appeals' decision raises the spectre of automobiles being continuously modified and restructured as they roll from jurisdiction to jurisdiction, while manufacturers seek to comply with conflicting local safety standards established through jury verdicts. The substantial

adverse effect on commerce that would result from the creation of multiple, inconsistent design criteria is likely to be incalculable. *See* Opinion at 26a. *See also Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959).

This Court has long recognized that the Commerce Clause acts as a significant independent limitation on the power of the states to regulate commerce. *Cooley* v. *Board of Wardens,* 53 U.S. 299 (1852). Moreover, the Court has applied the Commerce Clause to strike down not only state statutes that create an impermissible burden on interstate commerce, but also factual determinations by state courts, *Allenberg Cotton Co.* v. *Pittman,* 419 U.S. 20, 33-34 (1974), and damage awards based on state tort law, *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 246-47 (1959), that have the same effect. *See also Morgan* v. *Virginia,* 328 U.S. 373, 378-79 (1946) ("final court order" may be invalid burden on interstate commerce).

In a Commerce Clause analysis, legitimate state interests are weighed and balanced against competing or conflicting national interests. *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333, 350 (1977). *See* Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds,* 31 Vand L. Rev. 473, 490-97 (1978). This balancing process involves an analysis of four factors: (1) the legitimacy and weightiness of the purported state regulatory purpose; (2) the extent of the burden on commerce posed by the state policy or regulation; (3) the nature of the subject matter regulated; and (4) the nature of the effect of the state policy or regulation on commerce.

In weighing these factors the Court considers the availability of alternative means of achieving the state objective that would have a less severe impact on the flow of commerce. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *See* Blumstein, 31 Vand. L. Rev. at 497-508. When these factors are analyzed and balanced in this case, it is evident that the common-law standard as applied by the Court of Appeals creates an undue burden on interstate commerce.

State Purpose. Although the promotion of highway safety is certainly a proper state purpose, that purpose may not be effectuated in a way that unduly burdens commerce. Here, New Jersey's interest in safety can be achieved in a manner less destructive of the national goals of improving vehicle safety and establishing uniform performance standards—*i.e.*, merely by requiring a plaintiff, as part of a *prima facie* case of design defect, to prove that a proposed alternative design will comply with federal safety standards and be generally at least as safe as the challenged design when various collision situations are considered.[8]

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[8] Oregon, for example, requires that in order to prove a *prima facie* case of design defect a plaintiff must show not only that his alternative design will be safer in regard to the particular product feature at issue but also that the proposed design change will not impair the product's performance and safety in other respects. In *Wilson* v. *Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322, *rehearing denied*, 282 Or. 411, 579 P.2d 1287 (1978), plaintiffs alleged that a small plane was defectively designed in part because it had a carbureted rather than a fuel-injected engine. The jury returned a verdict against the airplane manufacturer on the basis of the plaintiffs' evidence that carbureted engines were more susceptible to icing than fuel-injected engines and the fuel-injected engines were not only technologically feasible but probably available for use at the time the plane was manufactured. The Oregon court noted:

(Footnote continued on following page)

Extent of the Burden. To meet the jury-imposed design standard in this case, the petitioner may be compelled to redesign its automobiles significantly only to be exposed to liability because of a conflicting standard imposed by another jury. Opinion at 25a-26a. The stark dilemma created for petitioner by the verdict in this case was aptly described by the Court of Appeals:

> while the jury found Chrysler liable for not producing a rigid enough frame, [should Chrysler re-design its frame accordingly] a factfinder in another case might well hold the manufacturer liable for producing a frame that is too rigid.

Id. Petitioner, unable to modify its automobiles to meet shifting state-to-state standards, would necessarily become an insurer of vast numbers of people involved in automobile accidents. *Id.* at 26a. The Commerce Clause was intended to prevent precisely this kind of economic balkanization. *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525 (1949).

Nature of the Subject Matter Regulated. Since the *Cooley* decision, this Court has held state regulation of matters

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(Footnote continued from preceding page)

> There is not, however, any evidence about what effect the substitution of a fuel-injected engine in this airplane design would have had upon the airplane's . . . over-all performance, or safety in respects other than susceptibility to icing.

Id. at 70, 577 P.2d at 1327. Consequently, the Oregon Supreme Court held that the plaintiffs failed to advance sufficient evidence to meet their burden of proving an alternative, safer design and that on this ground alone a new trial was required. *Id.* at 71, 577 P.2d at 1328.

requiring uniform national regulation to be invalid. As the Court noted in *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945), states cannot "regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." A maximum train length law was held invalid in *Southern Pacific* because of the "confusion" that would arise "under the varied system of state regulation" and the "unsatisfied need for uniformity in such regulation." *Id.* at 774. *See also Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. at 529-30. In this case, the expression by Congress of the need for national uniformity in setting vehicle safety standards is entitled to great weight.

Nature of the Effect on Commerce. The nature of a burden on commerce may be even more significant than its extent. *Pike* v. *Bruce Church, Inc.,* 397 U.S. at 145. One type of burden that is especially disfavored is the risk of multiple, inconsistent regulations imposed by a variety of states on interstate commercial enterprises. *Morgan* v. *Virginia,* 328 U.S. at 377-80; *Southern Pacific Co.* v. *Arizona,* 325 U.S. at 774; *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. at 524. Were other courts to follow the approach taken by the Court of Appeals in applying common-law liability, the likely result would be the generation of a panoply of inconsistent design standards that would have a devastating effect on the American automobile industry.

Balancing of the State and Federal Interests. While New Jersey's interest in safety is legitimate, it does not outweigh the burden that is imposed on interstate commerce in this instance. The case of *Bibb* v. *Navajo Freight Lines, Inc., supra,* is most instructive in this regard. The Court in *Bibb* held invalid an Illinois mudguard law pur-

portedly justified by safety concerns. Illinois argued that the contour mudguards were safer than the kind of mudguards permitted in neighboring states because the contour mudguards alleviated problems of flying debris. 529 U.S. at 525. In rejecting this argument, the Court found that the use of contour mudguards created other hazards to highway safety, such as brake overheating and mudguards falling off trucks onto the road. *Id.* The *Bibb* analysis suggests strongly that in this case the impact of respondents' proposed design on overall safety—not just the impact on safety in side-impact collisions with stationary objects—must be evaluated by the trier of fact before common-law liability may be imposed. *See also Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945). The narrow, myopic focus permitted in the instant case can yield only the most speculative contributions to motor vehicle safety. *See Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429 (1978).

Weighed against the inconclusive, and possibly even negative, overall safety effect of designs derived through a fragmented and myopic analysis is the substantial adverse effect on commerce that results from the creation of multiple, inconsistent design criteria. This burden on commerce is excessive in relation to the dubious benefits accruing from the Court of Appeals' decision. An overall crashworthiness standard would be compatible with existing federal norms, would more likely result in consistent adjudications, and would thus be less likely to impose an undue burden on interstate commerce.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 15, 1980

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1363

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

v.

CHRYSLER CORPORATION,

Defendant-Third Party Plaintiff,

v.

TOWNSHIP OF PENNSAUKEN, DELTA LEASING COMPANY and CHERRY HILL DODGE, INC.,

Third Party Defendants,

v.

Appendix A

TOWNSHIP OF PENNSAUKEN,

Fourth Party Plaintiff,

v.

CUMBERLAND MUTUAL FIRE INSURANCE COMPANY,

Fourth Party Defendant,

v.

PEERLESS INSURANCE COMPANY,

Fourth Party Defendant,

Defendant, Chrysler Corporation,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(C.A. No. 76-1651)

Argued January 7, 1980

Reargued April 30, 1980

Before: ADAMS, VAN DUSEN and WEIS, *Circuit Judges*

(Filed—September 11, 1980)

Appendix A

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

This appeal from a jury verdict and entry of judgment in favor of the plaintiffs arises out of a New Jersey automobile accident in which a police officer was seriously injured. The legal questions in this diversity action, that are governed by New Jersey law, are relatively straight-forward. The public policy questions, however, which are beyond the competence of this Court to resolve and with which Congress ultimately must grapple, are complex and implicate national economic and social concerns.

In adjudicating this appeal, we first decide the question whether the district court erred in denying the defendant's

motion for judgment notwithstanding the verdict. We then turn to the issue whether certain evidentiary mistakes were committed, which would require a new trial. The third substantive question relates to the propriety of the computation of prejudgment interest. Finally, we address the troubling public policy dilemma—namely, that under existing federal law individual juries in the various states are permitted, in effect, to establish national automobile safety standards. The result of such an arangement, predictably, is not only incoherence in the safety requirements set by disparate juries, but also the possibility that a standard established by a jury in a particular case will conflict with other policies regarding the economics of the automobile industry as well as energy conservation programs.

I. Factual Background

On September 7, 1974, Richard F. Dawson, while in the employ of the Pennsauken Police Department, was seriously injured as a result of an automobile accident that occurred in Pennsauken, New Jersey. As Dawson was driving on a rain-soaked highway, responding to a burglar alarm, he lost control of his patrol car—a 1974 Dodge Monaco. The car slid off the highway, over a curb, through a small sign, and into an unyielding steel pole that was fifteen inches in diameter. The car struck the pole in a backwards direction at a forty-five degree angle on the left side of the vehicle; the point of impact was the left rear wheel well. As a result of the force of the collision, the vehicle literally wrapped itself around the pole. The pole ripped through the body of the car and crushed Daw-

son between the seat and the "header" area of the roof, located just above the windshield. The so-called "secondary collision" of Dawson with the interior of the automobile dislocated Dawson's left hip and ruptured his fifth and sixth cervical vertebrae. As a result of the injuries, Dawson is now a quadraplegic. He has no control over his body from the neck down, and requires constant medical attention.

Dawson, his wife, and their son brought suit in the Court of Common Pleas of Philadelphia against the Chrysler Corporation, the manufacturer of the vehicle in which Dawson was injured. Chrysler removed the case to the United States District Court for the Eastern District of Pennsylvania, 28 U.S.C. §1441(a) (1976), on the grounds of diversity, and subsequently had the case transferred to the District Court for the District of New Jersey.[1] *Id.* §1404(a). The plaintiffs' claims were based on theories of strict products liability and breach of implied warranty of fitness. They alleged that the patrol car was defective because it did not have a full, continuous steel frame extending through the door panels, and a cross-member running through the floor board between the posts located between the front and rear doors of the vehicle. Had the vehicle been so designed, the Dawsons alleged, it would have "bounced" off the pole following relatively slight penetration by the pole into the passenger space.

Expert testimony was introduced by the Dawsons to prove that the existing frame of the patrol car was unable

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[1] Following transfer, Chrysler filed a third-party complaint against the Township of Pennsauken, Delta Leasing Co., and Cherry Hill Dodge, Inc. The Township then filed a fourth party complaint against the Cumberland Mutual Fire Insurance Co. and the Peerless Insurance Co. These parties are not involved in the present appeal.

to withstand side impacts at relatively low speed, and that the inadequacy of the frame permitted the pole to enter the passenger area and to injure Dawson. The same experts testified that the improvements in the design of the frame that the plaintiffs proposed were feasible and would have prevented Dawson from being injured as he was. According to plaintiffs' expert witnesses, a continuous frame and cross-member would have deflected the patrol car away from the pole after a minimal penetration into the passenger area and, they declared, Dawson likely would have emerged from the accident with only a slight injury.

In response, Chrysler argued that it had no duty to produce a "crashproof" vehicle, and that, in any event, the patrol car was not defective. Expert testimony for Chrysler established that the design and construction of the 1974 Dodge Monaco complied with all federal vehicle safety standards[2] and that deformation[3] of the body of the vehicle is desirable in most crashes because it absorbs the impact of the crash and decreases the rate of deceleration on the occupants of the vehicle. Thus, Chrysler's experts asserted that, for most types of automobile accidents, the design offered by the Dawsons would be less safe than the existing design. They also estimated that the steel parts that would be required in the model suggested by the Dawsons would have added between 200 and 250 pounds to the weight, and approximately $300 to the price of the vehicle. It was also established that the 1974 Dodge Monaco's uni-

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[2] *See* 49 C.F.R. 571.1 (1979).

[3] Deformation is a term used in this context to describe the collapsing of the body and frame of a vehicle upon impact with a stationary object.

body construction was stronger than comparable Ford and Chevrolet vehicles.

After the conclusion of all testimony, Chrysler moved for a directed verdict, which the district judge denied. The jury thereupon returned a verdict in favor of the plaintiffs. In answers to a series of special interrogatories, the jurors concluded that (1) the body structure of the 1974 Dodge Monaco was defective and unreasonably dangerous; (2) Chrysler breached its implied warranty that the vehicle would be fit for use as a police car; (3) as a result of the defective design and the breach of warranty, Dawson sustained more severe injuries than he would have incurred had Chrysler used the alternative design proposed by the Dawsons; (4) the defective design was the proximate cause of Dawson's enhanced injuries; and (5) Dawson's failure to use a seatbelt was not a proximate cause of his injuries. The jury awarded Mr. Dawson $2,064,863.19 for his expenses, disability, and pain and suffering, and granted Mrs. Dawson $60,000.00 for loss of consortium and loss of services. After the district court entered judgment,[4] Chrysler moved for judgment notwithstanding the verdict or, al-

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[4] The judgment as originally filed by the district court did not resolve the claims involving the third- and fourth-party plaintiffs and defendants to this action. *See* note 1 *supra*. However, the district court filed a certificate under Fed. R. Civ. P. 54(b) on January 1, 1980, certifying that a final judgment was entered with respect to the Dawsons' claims against Chrysler even though judgment had not yet been entered in the third- and fourth-party actions. Inasmuch as this certificate was entered prior to the argument before this Court and because neither party is prejudiced by the late filing of the Rule 54(b) certificate, we have appellate jurisdiction. *Tilden Financial Corp.* v. *Palo Tire Serv.*, 596 F.2d 604, 606-07 (3d Cir. 1979).

ternatively for a new trial. The court denied both motions. The Dawsons then requested pre-judgment interest of eight percent per annum of the damages award, accruing from the time suit was instituted to the date of the judgment. The trial judge granted the request in the amounts of $388,042.35 for Mr. Dawson and $11,274.72 for Mrs. Dawson.

On appeal, Chrysler raises the following contentions: (1) It owed no duty to the Dawsons to manufacture an automobile that would withstand the type of collision that occurred here. (2) The evidence presented by the Dawsons was insufficient to establish that the patrol car was defective and unreasonably dangerous or that Chrysler breached an implied warranty of fitness. (3) The evidence did not sufficiently establish that Dawson's injuries in fact were caused by the allegedly defective design. (4) The trial court erred in permitting Dawsons' attorney to use documents containing the results of automobile safety tests in cross-examining one of Chrysler's expert witnesses—without first establishing the reliability of the documents. (5) The district court erred in permitting the jurors to take into the jury room a copy of portions of a Calspan automobile safety report. (6) The trial judge erred in granting the Dawsons' motion for prejudgment interest.

We affirm.

II. Discussion

At the outset, it is important, indeed crucial, to point out, that the substantive issues of this diversity case are controlled by the law of New Jersey.

Appendix A

A. *Judgment Notwithstanding the Verdict*

Dawsons' claims are premised on two legal theories—strict tort liability and breach of an implied contractual warranty. As we recognized in *Huddell* v. *Levin*, 537 F.2d 726 (3d Cir. 1976), under the law of New Jersey, the governing principles of strict liability and the implied warranty theory are identical.[5] Accordingly, we proceed with the adjudication of this appeal pursuant to the rubric of strict liability.

Under New Jersey law, a defendant in a tort action may not be held liable unless he owes a duty of care to the plaintiff. The question of duty is to be resolved in the first instance by the trial court. If such a duty exists, then a jury in a strict liability action must decide two factual questions: (1) whether the product at issue was defective, and (2) whether the defective product was a proximate cause of the plaintiff's injuries. *Suter* v. *San Angelo Foundry & Machine Co.*, 81 N.J. 150, 176, 406 A.2d 140, 153 (1979). With these guidelines in mind, we turn to the contentions set forth by Chrysler in its appeal from the denial of its motion for judgment notwithstanding the verdict.

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[5] Most jurisdictions do not treat the doctrines of strict liability and implied warranty as identical concepts. For example, most states do not permit a plaintiff to recover under strict liability where the only damages alleged are for injuries to the defective products itself—that is, for the failure of the product to conform to the expectations of the buyer and the seller. *Compare Sentor* v. *A and M Karaghensian, Inc.*, 44 N.J. 52, 66, 207 A.2d 305, 312 (1965) with *Jones & Laughlin Steel Corp.* v. *Johns-Manville Sales Corp.*, Nos. 79-1433 & 79-1434 (3d Cir. filed July 9, 1980) (Illinois law) *and* cases cited therein, slip op. at 12-14 & n.13.

Appendix A

1. *Duty*

The New Jersey Supreme Court recently reviewed the concept of duty in tort actions and concluded that "[t]he question is ultimately one of public policy," and the answer "depends upon a balancing of the nature of the risk, the public interest and the relationship of the parties." *Id.* at 172, 406 A.2d at 151. The policies underlying the concept of duty include "the economic good of the group, practical administration of the law, justice between the parties and other considerations relative to the environment out of which the case arose." *Id.* (quoting Green, Duties, Risks, Causation, Doctrines, 41 Texas L. Rev. 42, 45 (1962)).

Chrysler urges that the district court erred in holding that it had a duty of care towards Dawson because it had no obligation to manufacture a vehicle that would protect a passenger against the type of harm suffered by Dawson. As we understand Chryler's argument, however, it appears to be directed, not to Chryler's duty vis-a-vis Dawson, but rather to the question whether the patrol car was defective inasmuch as it did not adequately prevent Dawson from sustaining serious injury. For, as we stated in *Huddell,* it is "beyond peradventure that an automobile manufacturer today has some legal obligation to design and produce a reasonably crashworthy vehicle. . . . Rephrased in the terminology of strict liability, the manufacturer must consider accidents as among the 'intended' uses of its products," and passengers injured in such accidents as among the group of reasonably foreseeable plaintiffs. 537 F.2d at 735. Thus, Chrysler had a duty to protect Dawson, as well as other users of its vehicles, against harm resulting from automobile accidents such as that

which occurred here. Whether Chrysler may be held liable depends, of course on concomitant findings that Chrysler breached this duty by producing a patrol car that was defective, and that the defective product proximately caused Dawson's injuries.

2. *Defective Product*

Thus, the controlling issue in the case is whether the jury could be permitted to find, under the law of New Jersey, that the patrol car was defective. In *Suter,* the New Jersey Supreme Court summarized its state's law of strict liability as follows:

> If at the time the seller distributes a product, it is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes so that users or others who may be expected to come in contact with the product are injured as a result thereof, then the seller shall be responsible for the ensuing damages.

81 N.J. at 169, 406 A.2d at 140 (footnote omitted). The court in adopting this test, specifically rejected the requirement of the Restatement (Second) of Torts §402A that the defect must cause the product to be "unreasonably dangerous to the user or consumer."[6] In the court's

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[6] Section 402A of the Restatement (Second) of Torts provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(Footnote continued on following page)

view, "the *Restatement* language may lead a jury astray for '[i]t may suggest an idea like ultra-hazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous.'" 81 N.J. at 175, 406 A.2d at 151 (quoting Wade, *On the Nature of Strict Liability for Products,* 44 Miss. L. J. 825, 832 (1973)).

The determination whether a product is "reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes" is to be informed by what the New Jersey Supreme Court has termed a "risk/utility analysis." *Cepeda* v. *Cumberland Engineering Co., Inc.,* 76 N.J. 152, 172-79, 386 A.2d 816, 825-29 (1978). Under this approach, a product is defective if "a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed." *Id.* at 172-73, 386 A.2d at 826 (quoting Keeton, *Products Liability and the*

(Footnote continued from preceding page)

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Appendix A

Meaning of Defect, 5 St. Mary's L. J. 30, 37-38 (1973) (emphasis in original)). The court in *Cepeda,* relying heavily on the article by Dean John Wade, referred to in *Suter,* identified seven factors that might be relevant to this balancing process:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 173-74, 386 A.2d at 826-27 (quoting Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L. J. 825, 837-38 (1973). The court suggested that the trial

judge first determine whether a balancing of these factors precludes liability as a matter of law. If it does not, then the judge is to incorporate into the instructions any factor for which there was presented specific proof and which might be deemed relevant to the jury's consideration of the matter. *Id.*

Chrysler maintains that, under these standards, the district court erred in submitting the case to the jury because the Dawsons failed, as a matter of law, to prove that the patrol car was defective. Specifically, it insists that the Dawsons did not present sufficient evidence from which the jury reasonably might infer that the alternative design that they proffered would be safer than the existing design, or that it would be cost effective, practical, or marketable. In short, Chrysler urges that the substitute design would be less socially beneficial than was the actual design of the patrol car. In support of its argument, Chrysler emphasizes that the design of the 1974 Dodge Monaco complied with all of the standards authorized by Congress in the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, tit. I, §107, 80 Stat. 118, *codified in* 15 U.S.C. §1396 (1976), and set forth in accompanying regulations, 49 C.F.R. §571.1 (1979).

Compliance with the safety standards promulgated pursuant to the National Traffic and Motor Vehicle Safety Act, however, does not relieve Chrysler of liability in this action. For, in authorizing the Secretary of Transportation to enact these standards, Congress explicitly provided, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. §1397(c) (1976). Thus, consonant with

this congressional directive, we must review Chrysler's appeal on the question of the existence of a defect under the common law of New Jersey that is set forth above.

Our examination of the record persuades us that the district court did not err in denying Chrysler's motion for judgment notwithstanding the verdict. The Dawsons demonstrated that the frame of the 1974 Dodge Monaco was noncontinuous—that is, it consisted of a front portion that extended from the front of the car to the middle of the front passenger seat, and a rear portion that ran from the middle of the rear passenger seat to the back end of the vehicle. Thus, there was a gap in the seventeen-inch side area of the frame between the front and rear seats. The plaintiffs also proved that, after colliding with the pole, the car slid along the left side portion of the rear frame until it reached the gap in the frame. At that point, the pole tore through the body of the vehicle into the passenger area and proceeded to push Dawson into the header area above the windshield.

Three experts—a design analyst, a mechanical engineer, and a biochemical engineer—also testified on behalf of the Dawsons. These witnesses had examined the patrol car and concluded that it was inadequate to withstand side impacts. They testified that there was an alternative design available which, had it been employed in the 1974 Monaco, would have prevented Dawson from sustaining serious injuries. The substitute design called for a continuous frame with an additional cross member running between the so-called B-posts—the vertical posts located at the side of the car between the front and rear seats. According to these witnesses, this design was known in the industry well before the accident and had been tested by a number of independent testing centers in 1969 and in 1973.

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The mechanical engineer conducted a number of studies in order to ascertain the extent to which the alternative design would have withstood the crash. On the basis of these calculations, he testified that the pole would have penetrated only 9.9 inches into the passenger space, and thus would not have crushed Dawson. Instead, the engineer stated, the car would have deflected off the pole and back into the highway. Under these circumstances, according to the biochemical engineer, Dawson would have been able to "walk away from the accident" with but a bruised shoulder.

Also introduced by the Dawsons were reports of tests conducted for the United States Department of Transportation, which indicated that, in side collisions with a fixed pole at twenty-one miles per hour,[7] frame improvements similar to those proposed by the experts presented by the Dawsons reduced intrusion into the passenger area by fifty percent, from sixteen inches to eight inches. The study concluded that the improvements, "in conjunction with interior alterations demonstrated a dramatic increase in occupant protection."[8] There was no suggestion at trial that the alternative design recommended by the Dawsons would not comply with federal safety standards. On cross-examination, Chrysler's attorney did get the Dawsons' expert witnesses to acknowledge that the alternative design would add between 200 and 250

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[7] Eyewitness as well as expert testimony was introduced to show that the speed of the car at the time of impact was between twenty-four and twenty-six miles per hour.

[8] J. Greene, Basic Research in Crashworthiness II—Development and Testing of Vehicle Side Structure Modifications, 151 (1973).

pounds to the vehicle and would cost an additional $300 per car. The Dawsons' experts also conceded that the heavier and more rigid an automobile, the less able it is to absorb energy upon impact with a fixed object, and therefore the major force of an accident might be transmitted to the passengers. Moreover, an expert for Chrysler testified that, even if the frame of the patrol car had been designed in conformity with the plaintiffs' proposals, Dawson would have sustained injuries equivalent to those he actually incurred. Chrysler's witness reasoned that Dawson was injured, not by the intrusion of the pole into the passenger space, but as a result of being thrown into the header area of the roof by the vehicle's initial contact with the pole—that is, prior to the impact of the pole against the driver's seat.

On the basis of the foregoing recitation of the evidence presented respectively by the Dawsons and by Chrysler, we conclude that the record is sufficient to sustain the jury's determination, in response to the interrogatory, that the design of the 1974 Monaco was defective. The jury was not required to ascertain that all of the factors enumerated by the New Jersey Supreme Court in *Cepeda* weighed in favor of the Dawsons in order to find the patrol car defective. See pp. [12a-14a] *supra.* Rather, it need only to have reasonably concluded, after balancing these factors, that, at the time Chrysler distributed the 1974 Monaco, the car was "not reasonbly fit, suitable and safe for its intended or reasonably foreseeable purposes." *Suter,* 81 N.J. at 169, 406 A.2d at 149. Moreover, our role in reviewing the record for purposes of determining whether a trial judge erred in denying a motion for a directed verdict or for judgment notwithstanding the verdict is necessarily a limited one. As we said in *Hud-*

dell, " 'The Seventh Amendment bars appellate review of facts found by a jury in actions at common law. . . .' " 537 F.2d at 736 (quoting 9 C. Wright & A. Miller, Federal Practice and Procedure §2571, at 681 (1971)). Thus, we are admonished to review the record in this case in the light most favorable to the nonmoving party, the Dawsons, and to affirm the judgment of the district court denying the motions unless the record "is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Denneny* v. *Siegel,* 407 F.2d 433, 439 (3d Cir. 1969); *accord, Huddell,* 537 F.2d at 737. We hold that it is not.

3. *Proximate Cause*

The remaining question in regard to the motion for judgment notwithstanding the verdict is whether the Dawsons presented sufficient evidence to permit the jury reasonably to conclude that the design defect was the proximate cause of Dawson's injuries. In this regard, Chrysler advances three arguments. First, it urges that the patrol car was substantially modified by Dawson's employer in such a way that the car, as sold by Chrysler, could not be said to have caused the injuries. Second, it maintains that Dawson's failure to wear a seatbelt was, in fact, the proximate cause of his injuries.[9] Third, it claims that there was insufficient evidence that the defect caused Dawson to suffer more severe injuries than he would have incurred had the alternative design been employed—that is, had the patrol car not been defective.

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[9] Dawson testified that, at the time of the accident, he was not wearing a seat belt, but that this was customary police practice in order to permit officers to enter and leave their vehicles as quickly as possible.

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Counsel for the Dawsons conceded that the patrol car had been modified by the addition of a tubular roll bar and a wire mesh screen that extended between the front and rear passenger areas in order to separate the police officer from suspects. Dawsons' expert witnesses testified, however, that this alteration neither compromised the structural integrity of the vehicle, nor in any way contributed to Dawson's injuries. In contrast, the expert witnesses for Chrysler testified merely that they were not certain whether the modifications affected Dawson's injuries. Under these circumstances, the jury's implicit conclusion that the alterations were not the proximate cause of Dawson's injuires is supported by the evidence.

The jury specifically found in interrogatory five that Dawson's failure to wear his seatbelt was not a proximate cause of his injuries. Chrysler presented expert testimony that Dawson was injured when he "ramped" up the back seat into the roof of the car—that is, as he slid upwards out of his seat along the back rest—following the vehicle's initial impact with the pole. It argues therefore, that if Dawson had been wearing a seatbelt, he would not have been thrown out of the seat and would not have smashed into the roof of the car. Chrysler maintains that the jury's verdict is inconsistent with this testimony.

In *Huddell,* we noted in reviewing on appeal a question regarding causation that "the credibility of opinion evidence is for the fact-finder." 537 F.2d at 737. Here, the Dawsons presented expert witnesses who contradicted Chrysler's theory of causation. Observing initially that the patrol car was moving backwards at a forty-five degree angle at the time of impact, the witnesses opined that the force of the collision must have pushed Dawson's back and left shoulder against the rear of the seat. Under these

circumstances, they concluded, he did not "ramp" up the seat into the roof, but remained in the seat until the pole entered the passenger space, collided with the rear of the seat, and pushed both the seat and Dawson into the ceiling. In other words, had the pole been prevented from crushing up against the rear of the driver's seat, Dawson would not have been thrown into the ceiling. This testimony was corroborated by a third expert, who stated that the nature of Dawson's dislocated hip indicated that he was not thrown from the seat as Chrysler's witnesses maintained. The jurors reasonably could have found the testimony offered by the Dawsons' witnesses to be more persuasive than Chrysler's. Accordingly, Chrysler's contention that the jury's verdict is at odds with the evidence is without merit.

Chrysler's last argument regarding causation is that the plaintiffs failed to prove that Dawson's injuries were enhanced as a result of the design-defect in the patrol car. As with the other contentions, the record does not support this claim. The Dawsons presented expert testimony that the alternative design would have prevented the pole from intruding far enough into the passenger space to hit the front seat. And, as we have just observed, there was testimony that Dawson was not thrown into the ceiling of the car, but rather was crushed up against the roof as the pole forced the passenger seat into the roof. Had Dawson remained in his seat from gravity forces, and had the seat not been jammed against the roof, it is a reasonable inference that his cervical vertebrae would not have been ruptured. Indeed, the biomechanical engineer who evaluated the accident and testified for the Dawsons concluded that, if the pole had not entered the patrol car and crushed Dawson, the officer

would have suffered no more than a bruised shoulder. In view of this testimony, we cannot say that the jury's verdict on the question of proximate cause is unsupported by the record.

4. *Summary*

Inasmuch as we conclude that it was not incorrect for the district court to hold that Chrsyler had a legal duty to protect Dawson against the type of accident in which he was injured, and because the jury's findings that the 1974 Monaco was not reasonably fit to withstand the accident and that the defect proximately caused Dawson's injuries were supported by the evidence, the district court did not err in denying Chrysler's motion for judgment notwithstanding the verdict.

B. *New Trial*

1. *Admissibility of Calspan Report*

During cross-examination of one of Chrysler's expert witnesses, the attorney for the Dawsons referred to the conclusions reached in two reports on the subject of automobile crashworthiness. These reports were prepared for the United States Department of Transportation by the Calspan Corporation (formerly the Cornell Aeronautical Laboratory, Inc., of Buffalo, New York. Quotations from documents of this kind are admissible under the exception to the hearsay rule contained in Fed. R. Evid. 803(18), which provides:

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> To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

In this case, the authoritativeness of the reports was inferentially conceded by one of Chrysler's expert witnesses. When asked by Dawsons' counsel, "since you calculated some data from them, they're reliable in that regard, aren't they," the witness replied: "Well, I have no reason to doubt their test data reflected in [the] reports." Moreover, Chrysler did not object to the use of the Calspan report. Accordingly, we hold that the Dawsons' use during cross-examination of the Calspan reports was not precluded by Rule 803(18).

Chrysler also challenges the decision of the district court, following the conclusion of all testimony, to admit the Calspan reports into evidence as plaintiffs' exhibits 110 and 111. At the time the reports were offered, Chrysler did not object to their admissibility. Although Rule 803(18) provides that such reports or treatises not be received as exhibits, in light of the fact that there was no objection to the reports and inasmuch as the jurors did not take them into the jury room during their deliberations, we conclude that the error here, if any, was harmless.

2. *Jury's Use of Diagram*

One page of one of the Calspan reports, which contained a diagram of the exterior deformation of a test car following a side collision with a stationary pole, was introduced as plaintiffs' exhibit 107, and was taken by the jurors into the jury room when they retired to decide the case. Chrysler objected to neither the admission of the document nor to the jury's use of it. On appeal, however, it urges that the admission and use by the jury of the diagram constitutes reversible error.

Although the admission of the document as an exhibit abridged the terms of Rule 803(18), we cannot say, in view of Chrysler's failure to object, that the district court committed reversible error in this regard. Even assuming arguendo that the trial court erred, in the context of this case, the error was harmless. Independent of the exhibit, there was testimony regarding the contents of the Calspan report, including the diagram in question. Counsel for the Dawsons extensively cross-examined one of Chrysler's experts about the tests diagrammed in the exhibit. In short, the exhibit was merely duplicative of the testimony. *Cf. Ammer* v. *American Export Lines, Inc.*, 326 F.2d 955, 957 n.2 (2d Cir.) (plaintiff's counsel's reading during closing argument of a physician's report that was not admitted into evidence held harmless error because the report "said in substance what the doctor had stated on the stand"), *cert. denied,* 397 U.S. 824 (1964).

For these reasons, the district court did not err in denying Chrysler's motion for a new trial.

C. *Prejudgment Interest*

Chrysler's final argument is that the district court improperly computed the amount of prejudgment interest

recoverable by the Dawsons. Specifically, it urges that prejudgment interest is not available on the portion of the damages award that will be used to pay the contingent fee owed to plaintiffs' counsel or on that portion of the award on which Dawson's workers compensation insurer has a lien.

Prejudgment interest in New Jersey tort actions is authorized by Rule 4:42-11(b) of the Civil Practice Rules Governing the Courts of the State of New Jersey (West 1979), which states:

> [T]he court shall, in tort actions, including products liability actions, include in the judgment simple interest at 8% per annum on the amount of the award from the date of the institution of the action or from a date 6 months after the date of the tort, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

No New Jersey case dealing with the issues raised in Chrysler's contentions regarding prejudgment interest has come to our attention. Moreover, Rule 4:42-11(b) itself provides no indication that the New Jersey Supreme Court, in adopting the Rule, intended to exclude from prejudgment interest the portion of the damage award owing to plaintiffs' counsel and Dawson's compensation carrier.[10] Under these circumstances, we decline to carve out of the rule the exemptions from prejudgment interest urged by

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[10] Under the Rule, however, counsel for plaintiff will not receive any prejudgment interest.

Chrysler. In the absence of some authority for the creation of such exemptions, Chrysler's arguments—which may well have merit—are best directed to the drafters of the Rule, the New Jersey Supreme Court, or to the New Jersey legislature.

II. Conclusion

Although we affirm the judgment of the district court, we do so with uneasiness regarding the consequences of our decision and of the decisions of other courts throughout the country in cases of this kind.

As we observed earlier, (see [page 14a] above) Congress, in enacting the National Traffic and Motor Vehicle Safety Act, provided that compliance with the Act does not exempt any person from liability under the common law of the state of injury. The effect of this provision is that the states are free, not only to create various standards of liability for automobile manufacturers with respect to design and structure, but also to delegate to the triers of fact in civil cases arising out of automobile accidents the power to determine whether a particular product conforms to such standards. In the present situation, for example, the New Jersey Supreme Court has instituted a strict liability standard for cases involving defective products, has defined the term "defective product" to mean any such item that is not "reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes," and has left to the jury the task of determining whether the product at issue measures up to this standard.

The result of such arrangement is that while the jury found Chrysler liable for not producing a rigid enough vehicular frame, a factfinder in another case might well

hold the manufacturer liable for producing a frame that is too rigid. Yet, as pointed out at trial, in certain types of accidents—head-on collisions—it is desirable to have a car designed to collapse upon impact because the deformation would absorb much of the shock of the collision, and divert the force of deceleration away from the vehicle's passengers. In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents.

Equally serious is the impact on other national social and economic goals of the existing case-by-case system of establishing automobile safety requirements. As we have become more dependent on foreign sources of energy, and as the price of that energy has increased, the attention of the federal government has been drawn to a search to find alternative supplies and the means of conserving energy. More recently, the domestic automobile industry has been struggling to compete with foreign manufacturers which have stressed smaller, more fuel-efficient cars. Yet, during this same period, Congress has permitted a system of regulation by ad hoc adjudications under which a jury can hold an automobile manufacturer culpable for not producing a car that is considerably heavier, and likely to have less fuel efficiency.

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In sum, this appeal has brought to our attention an important conflict that implicates broad national concerns. Although it is important that society devise a proper system for compensating those injured in automobile collisions, it is not at all clear that the present arrangement of permitting individual juries, under varying standards of liability, to impose this obligation on manufacturers is fair or efficient. Inasmuch as it was the Congress that set this system in motion, and because Congress is the body best suited to evaluate and, if appropriate, to change that system, we decline today to do anything in this regard except to bring the problem to the attention of the legislative branch.

Bound as we are to adjudicate this appeal according to the substantive law of New Jersey, and because we find no basis in that law to overturn the jury's verdict, the judgment of the district court will be affirmed.

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1363

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA Dawson as parent and natural Guardian of BRYAN DAWSON, a minor,

vs.

CHRYSLER CORPORATION,

Defendant-Third Party Plaintiff,

vs.

TOWNSHIP OF PENNSAUKEN, DELTA LEASING COMPANY and CHERRY HILL DODGE, INC.,

Third Party Defendants,

and

TOWNSHIP OF PENNSAUKEN,

Fourth Party Plaintiff,

vs.

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CUMBERLAND MUTUAL FIRE INSURANCE COMPANY,

Fourth Party Defendant,

PEERLESS INSURANCE COMPANY,

Fourth Party Defendant,

Defendant, CHRYSLER CORPORATION,

Appellant.

(D. C. Civil No. 76-1651)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

ADAMS, VANDUSEN and WEIS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 7, 1980 and reargued on April 30, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 25, 1979, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

SALLY MRVOS
Clerk

September 11, 1980

APPENDIX C

Order Denying the Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1363

RICHARD F. DAWSON, *et al., etc.,*

v.

CHRYSLER CORPORATION, *et al.,*

Chrysler Corporation, Appellant.

SUR PETITION FOR REHEARING EN BANC

Present:

ADAMS, VANDUSEN, GIBBONS, ROSEN, HUNTER, WEIS and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Appellant, Chrysler Corporation, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of

the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
ARLIN M. ADAMS
Circuit Judge

Dated: October 17, 1980

Judges Seitz, Aldisert, Garth and Sloviter took no part in this petition.

APPENDIX D

Excerpts from the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, Tit. I §107, 80 Stat. 718 (as codified in 15 U.S.C. §1381 *et seq.*)

CHAPTER 38.—TRAFFIC AND MOTOR VEHICLE SAFETY

[Outline of Provisions]

Sec.

1381. Congressional declaration of purpose [p. 40a].

Subchapter I.—Motor Vehicle Safety Standards

Part A—General Provisions

1391. Definitions [p. 40a-43a].

1392. Motor vehicle safety standards [p. 43a-47a].

(a) Establishment.

(b) Applicability of Administrative Procedure Act.

(c) Effective date of orders.

(d) Supremacy of federal standards; allowable higher standards for vehicles used by federal or state governments [p. 44a].

(e) Amendment and revocation of standards.

(f) Factors to be considered in prescribing standards.

(g) Interstate motor carriers and carriers of explosives and other dangerous articles.

(h) Issuance of initial federal safety standards.

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1393. [Repealed.]

1394. Judicial review of orders establishing standards; additional evidence before Secretary; certified copy of transcript.

1395. Research, testing, development, and training in traffic and vehicle safety.

(a) Scope of research.

(b) Grants for research.

(c) Availability of developed data to general public.

1396. Cooperation of Secretary with governmental and private agencies in developing standards.

1397. Prohibition against manufacture, sale, delivery, or importation of substandard vehicles [pp. 48a-53a].

(a) Access to records; certificate; notification of defect.

(b) Sale or delivery of used vehicles; federal standards for used vehicles; good faith failure to conform to federal safety standards; importation of substandard vehicles.

(c) Continuation of common law liability [p. 53a].

1398. Civil penalties; Secretary's authority to compromise.

1399. Jurisdiction of United States District Court.

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(a) Restraining violations of motor vehicle standards; injunction; notice; opportunity to achieve compliance.

(b) Criminal contempt; trial by jury.

(c) Venue.

(d) Subpoenas.

(e) Designation by manufacturers offering vehicle for importation of agent for service of process.

1400. Noncompliance with safety standards.

(a) Repurchase from distributor or dealer of vehicle not meeting standards.

(b) Civil action against manufacturer or distributor refusing to repurchase substandard vehicles; period of limitation.

(c) Determination of reimbursements for required installations.

1401. Inspection and investigation to enforce safety standards.

(a) Results of investigations given to Secretary of Treasury or Attorney General for action.

(b) Entry into factory, warehouse, or manufacturing establishment; reasonable inspection.

(c) Records, reports, and information from manufacturers; inspections and examination of relevant documents.

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(d) Performance and technical data; supplying data to each prospective purchaser and to first purchaser.

(e) Confidential information and trade secrets.

1402. Cost information.

(a) Submission and evaluation.

(b) Availability to public; publication in Federal Register; confidentiality of trade secrets and other confidential matter; information to committees of Congress.

(c) Definition.

(d) Rules and regulations.

(e) Authority of Secretary under other provisions unaffected.

1403. Certification of conformity with motor vehicle safety standards; form and placement of certification.

1404. National Traffic Safety Bureau; Traffic Safety Director; appointment.

1405. Effect upon antitrust laws.

1406. Use of testing and research facilities of public agencies.

1407. Rules and regulations.

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1408. Annual report to Congress; contents; recommendations.

1409. Authorization of appropriations.

1410. Exemption from safety standards of motor vehicles.

(a) Eligibility; procedure; criteria for temporary exemption or renewal of exemption; publication of notice of decision in Federal Register.

(b) Permanent labeling of exempted motor vehicle; contents; notification of dealer and first purchaser of exemption.

(c) Limitation periods for exemption or renewal; reapplication for renewal.

(d) Manufacturers eligible for exemptions.

(e) Applications for exemptions; contents.

(f) Promulgation of regulations for applications; disclosure of information contained in application.

(g) Definitions.

1410a. Petition of interested persons.

(a) Requests for Secretary's commencement of proceedings.

(b) Contents; factual statement; description of relief.

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(c) Public hearings or appropriate investigation or proceeding.

(d) Time of determination; commencement of proceedings upon grant of petition; publication in Federal Register of reasons for denial of petition.

(e) Additional remedies.

1410b. Occupant restraint systems.

(a) Amendment of Federal motor vehicle safety standard numbered 208; effective date.

(b) Federal motor vehicle safety standard requirements.

(c) Federal motor vehicle safety standard promulgation procedure; rule making requirement; data, view or arguments: presentation opportunity; transcript; notification of Congressional Committee; data, views, or arguments of Members of Congress; transmittal of standard to Congress and Congressional Committees.

(d) Concurrent resolution of disapproval during prescribed period; Federal motor vehicle safety standard effective upon expiration of such period.

(e) Judicial review of Federal motor vehicle safety standard.

(f) Definitions.

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PART B—DISCOVERY, NOTIFICATION, AND REMEDY OF MOTOR VEHICLE DEFECTS

1411. Notification respecting manufacturer's finding of defect or failure to comply.

1412. Notification respecting Secretary's finding of defect or failure to comply; publication in Federal Register; data, views, and arguments; presentation opportunity.

1413. Notice; contents, time, and form.

1414. Remedy of defect or failure to comply; publication in Federal Register; program filed with Secretary: notice of availability, publication in Federal Register.

1415. Enforcement of notification and remedy orders.

(a) Civil actions; venue; change of venue; consolidation; expedition of proceedings.

(b) Notification contents; liability of manufacturer.

(c) Civil actions for nonnotification of owners or purchasers; liability of manufacturer.

(d) Orders of Secretary against manufacturer; conditions for issuance.

1416. Reasonableness of notification and remedy; hearing.

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1417. Exemption for inconsequential defect or failure to comply; notice in Federal Register; data, views, and arguments: presentation opportunity.

1418. Information, disclosure, and recordkeeping; confidential information.

1419. Definitions.

1420. Effect on other laws.

SUBCHAPTER II.—TIRE SAFETY

1421. Labeling for pneumatic tires; required contents of label.

1422. Standards for original equipment tires; maximum permissible load standards to be met.

1423. Uniform quality grading system for motor vehicle tires; elimination of deceptive and confusing tire nomenclature.

1424. Regrooved tires.

1425. Conflicts with orders of Federal Trade Commission.

1426. Safety standards for retreaded tires.

SUBCHAPTER III.—RESEARCH AND TEST FACILITIES

1431. Facilities for research and testing in traffic safety.

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15 U.S.C. §1391

§ 1381. CONGRESSIONAL DECLARATION OF PURPOSE

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

Pub.L. 89-563, § 1, Sept. 9, 1966, 80 Stat. 718.

SUBCHAPTER I—MOTOR VEHICLE SAFETY STANDARDS
PART A—GENERAL PROVISIONS

§ 1391. DEFINITIONS

As used in this subchapter—

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

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(3) "Motor vehicle" means any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highways, except any vehicle operated exclusively on a rail or rails.

(4) "Motor vehicle equipment" means any system, part, or component of a motor vehicle as originally manufactured or any similar part or component manufactured or sold for replacement or improvement of such system, part, or component or as any accessory, or addition to the motor vehicle, and any device, article, or apparel not a system, part, or component of a motor vehicle (other than medicines, or eyeglasses prescribed by a physician or other duly licensed practitioner), which is manufactured, sold, delivered, offered, or intended for use exclusively to safeguard motor vehicles, drivers, passengers, and other highway users from risk of accident, injury, or death.

(5) "Manufacturer" means any person engaged in the manufacturing or assembling of motor vehicles or motor vehicle equipment, including any person importing motor vehicles or motor vehicle equipment for resale.

(6) " Distributor" means any person primarily engaged in the sale and distribution of motor vehicles or motor vehicle equipment for resale.

(7) "Dealer" means any person who is engaged in the sale and distribution of new motor vehicles or motor vehicle equipment primarily to purchasers who in good faith purchase any such vehicle or equipment for purposes other than resale.

(8) "State" includes each of the several States, the District of Columbia, the Commonwealth of Puerto Rico,

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Guam, the Virgin Islands, the Canal Zone, and American Samoa.

(9) "Interstate commerce" means commerce between any place in a State and any place in another State, or between places in the same State through another State.

(10) "Secretary" means the Secretary of Transportation.

(11) "Defect" includes any defect in performance, construction, components, or materials in motor vehicles or motor vehicle equipment.

(12) "United States district courts" means the Federal district courts of the United States and the United States courts of the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

(13) "Vehicle Equipment Safety Commission" means the Commission established pursuant to the joint resolution of the Congress relating to highway traffic safety, approved August 20, 1958 (72 Stat. 635), or as it may be hereafter reconstituted by law.

(14) "schoolbus" means a passenger motor vehicle which is designed to carry more than 10 passengers in addition to the driver, and which the Secretary determines is likely to be significantly used for the purpose of transporting primary, preprimary, or secondary school students to or from such schools or events related to such schools.

(15) "schoolbus equipment" means equipment designed primarily as a system, part, or component of a schoolbus, or any similar part or component manufactured or sold

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for replacement or improvement of such system, part, or component or as an accessory or addition to a schoolbus.

Pub.L. 89-563, Title I, §102, Sept. 9, 1966, 80 Stat. 718; Pub.L. 89-670, § 6(a)(6)(A), Oct. 15, 1966, 80 Stat. 937. Pub.L. 91-265, § 2, May 22, 1970, 84 Stat. 262; Pub.L. 93-492, Title I, § 110(a), Title II, § 201, Oct. 27, 1974, 88 Stat. 1484.

§ 1392. MOTOR VEHICLE SAFETY STANDARDS—ESTABLISHMENT

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

Applicability of Administrative Procedure Act

(b) The Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.

Effective date of orders

(c) Each order establishing a Federal motor vehicle safety standard shall specify the date such standard is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date such order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

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Supremacy of federal standards; allowable higher standards for vehicles used by federal or state governments

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

Amendment and revocation of standards

(e) The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

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Factors to be considered in prescribing standards

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

Interstate motor carriers and carriers of explosives and other dangerous articles

(g) In prescribing safety regulations covering motor vehicles subject to part II of the Interstate Commerce Act, as amended, or the Transportation of Explosives Act, as amended, the Interstate Commerce Commission shall not adopt or continue in effect any safety regulation which differs from a motor vehicle safety standard issued by the

Secretary under this subchapter, except that nothing in this subsection shall be deemed to prohibit the Interstate Commerce Commission from prescribing for any motor vehicle operated by a carrier subject to regulation under either or both of such Acts, a safety regulation which imposes a higher standard of performance subsequent to its manufacture than that required to comply with the applicable Federal standard at the time of manufacture.

Issuance of initial federal safety standards

(h) The Secretary shall issue initial Federal motor vehicle safety standards based upon existing safety standards on or before January 31, 1967. On or before January 31, 1968, the Secretary shall issue new and revised Federal motor vehicle safety standards under this subchapter.

Schoolbus and schoolbus equipment safety standards

(i)(1)(A) Not later than 6 months after October 27, 1974, the Secretary shall publish proposed Federal motor vehicle safety standards to be applicable to schoolbuses and schoolbus equipment. Such proposed standards shall include minimum standards for the following aspects of performance:

(i) Emergency exists.

(ii) Interior protection for occupants.

(iii) Floor strength.

(iv) Seating systems.

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(v) Crash worthiness of body and frame (including protection against rollover hazards).

(vi) Vehicle operating systems.

(vii) Windows and windshields.

(viii) Fuel systems.

(B) Not later than 15 months after October 27, 1974, the Secretary shall promulgate Federal motor vehicle safety standards which shall provide minimum standards for those aspects of performance set out in clauses (i) through (viii) of subparagraph (A) of this paragraph, and which shall apply to each schoolbus and item of schoolbus equipment which is manufactured in or imported into the United States on or after April 1, 1977.

(2) The Secretary may prescribe regulations requiring that any schoolbus be test-driven by the manufacturer before introduction into commerce.

(3) Not later than six months after July 8, 1976, the Secretary shall conduct a study and report to Congress on (A) the factors relating to the schoolbus vehicle which contribute to the occurrence of schoolbus accidents and resultant injuries, and (B) actions which can be taken to reduce the likelihood of occurrence of such accidents and severity of such injuries. Such study shall consider, among other things, the extent to which injuries may be reduced through the use of seat belts and other occupant restraint systems in schoolbus accidents, and an examination of the extent to which the age of schoolbuses increases the likelihood of accidents and resultant injuries.

Pub.L. 89-563, Title I, § 103, Sept. 9, 1966, 80 Stat. 719; Pub.L. 93-492, Title II, § 202, Oct. 27, 1974, 88 Stat. 1484; Pub.L. 94-346, §§ 2, 3, July 8, 1976, 90 Stat. 815.

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§ 1397. PROHIBITION AGAINST MANUFACTURE, SALE, DELIVERY, OR IMPORTATION OF SUBSTANDARD VEHICLES AND AGAINST RENDERING INOPERATIVE CERTAIN DEVICES, ELEMENTS OF DESIGN OR MOTOR VEHICLE EQUIPMENT—ACCESS TO RECORD; CERTIFICATION; NOTIFICATION OF DEFECT; "MOTOR VEHICLE REPAIR BUSINESS" DEFINED; EXEMPTIONS FROM INOPERATION RESTRICTION; EXEMPTION OF SAFETY BELT INTERLOCKS AND CONTINUOUS BUZZERS.

(a)(1) No person shall—

(A) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect under this subchapter unless it is in conformity with such standard except as provided in subsection (b) of this section;

(B) fail or refuse access to or copying of records, or fail to make reports or provide information, or fail or refuse to permit entry or inspection, as required under section 1401 of this title; fail to keep specified records in accordance with such section; or fail or refuse to permit impounding, as required under section 1401(a) of this title;

(C) fail to issue a certificate required by section 1403 of this title, or issue a certificate to the effect

that a motor vehicle or item of motor vehicle equipment conforms to all applicable Federal motor vehicle safety standards, if such person in the exercise of due care has reason to know that such certificate is false or misleading in a material respect;

(D) fail—

(i) to furnish notification,

(ii) to remedy any defect or failure to comply, or

(iii) to maintain records,

as required by part B of this subchapter; or fail to comply with any order or other requirement applicable to any manufacturer, distributor, or dealer pursuant to such part B;

(E) fail to comply with any rule, regulation, or order issued under section 1401 or 1404 of this title; and

(F) to fail to comply with regulations of the Secretary under section 1392(i)(2) of this title.

(2)(A) No manufacturer, distributor, dealer, or motor vehicle repair business shall knowingly render inoperative, in whole or part, any device or element of design installed on or in a motor vehicle or item of motor vehicle equipment in compliance with an applicable Federal motor vehicle safety standard, unless such manufacturer, distributor, dealer, or repair business reasonably believes that such vehicle or item of equipment will not be used (other than for testing or similar purposes in the course of maintenance or repair) during the time such device

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or element of design is rendered inoperative. For purposes of this paragraph, the term "motor vehicle repair business" means any person who holds himself out to the public as in the business of repairing motor vehicles or motor vehicle equipment for compensation.

(B) The Secretary may by regulation exempt any person from this paragraph if he determines that such exemption is consistent with motor vehicle safety and the purposes of this chapter. The Secretary may prescribe regulations defining the term "render inoperative".

(C) This paragraph shall not apply with respect to the rendering inoperative of (i) any safety belt interlock (as defined in section 1410b(f)(1) of this title) or (ii) any continuous buzzer (as defined in section 1410b (f)(4) of this title) designed to indicate that safety belts are not in use.

(D) Paragraph (1)(A) of this subsection shall not apply to the sale or offering for sale of any motor vehicle which has such a buzzer or interlock rendered inoperative by a dealer at the request of the first purchaser of such vehicle.

Sale or delivery of used vehicles; federal standards for used vehicles; good faith failure to conform to federal safety standards; importation of substandard vehicles

(b)(1) Paragraph (1)(A) of subsection (a) of this section shall not apply to the sale, the offer for sale, or the introduction or delivery for introduction in interstate

commerce of any motor vehicle or motor vehicle equipment after the first purchase of it in good faith for purposes other than resale. In order to assure a continuing and effective national traffic safety program, it is the policy of Congress to encourage and strengthen the enforcement of State inspection of used motor vehicles. Therefore to that end the Secretary shall conduct a thorough study and investigation to determine the adequacy of motor vehicle safety standards and motor vehicle inspection requirements and procedures applicable to used motor vehicles in each State, and the effect of programs authorized by this subchapter upon such standards, requirements, and procedures for used motor vehicles, and report to Congress as soon as practicable but not later than September 9, 1967, the results of such study, and recommendations for such additional legislation as he deems necessary to carry out the purposes of this chapter. As soon as practicable after the submission of such report but no later than one year from the date of submission of such report, the Secretary, after consultation with the Council and such interested public and private agencies and groups as he deems advisable, shall establish uniform Federal motor vehicle safety standards applicable to all used motor vehicles. Such standards shall be expressed in terms of motor vehicle safety performance. The Secretary is authorized to amend or revoke such standards pursuant to this chapter.

(2) Paragraph (1)(A) of subsection (a) of this section shall not apply to any person who establishes that he did not have reason to know in the exercise of due care that such vehicle or item of motor vehicle equipment is not in conformity with applicable Federal motor

vehicle safety standards, or to any person who, prior to such first purchase, holds a certificate issued by the manufacturer or importer of such motor vehicle or motor vehicle equipment, to the effect that such vehicle or equipment conforms to all applicable Federal motor vehicle safety standards, unless such person knows that such vehicle or equipment does not so conform.

(3) A motor vehicle or item of motor vehicle equipment offered for importation in violation of paragraph (1)(A) of subsection (a) of this section shall be refused admission into the United States under joint regulations issued by the Secretary of the Treasury; except that the Secretary of the Treasury and the Secretary may, by such regulations, provide for authorizing the importation of such motor vehicle or item of motor vehicle equipment into the United States upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or item of motor vehicle equipment will be brought into conformity with any applicable Federal motor vehicle safety standard prescribed under this subchapter, or will be exported or abandoned to the United States.

(4) The Secretary of the Treasury and the Secretary may, by joint regulations, permit the temporary importation of any motor vehicle or item of motor vehicle, equipment after the first purchase of it in good faith for purposes other than resale.

(5) Paragraph (1)(A) of subsection (a) of this section shall not apply in the case of a motor vehicle or item of motor vehicle equipment intended solely for export, and so labeled or tagged on the vehicle or item

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itself and on the outside of the container, if any, which is exported.

Continuation of common law liability

(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Pub.L. 89-563, Title I, § 108, Sept. 9, 1966, 80 Stat. 722; Pub.L. 93-492, Title I, § 103(a), Title II, § 203, Oct. 27, 1974, 88 Stat. 1477, 1485.

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APPENDIX E

Federal Motor Vehicle Safety Standard 208, 49 C.F.R. §571.208 (1972)

§ 571.208 Standard No. 208; Occupant crash protection. (Effective Jan. 1, 1972, with amendments effective Jan. 1, 1973)

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9, *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.1 *Passenger cars manufactured from January 1, 1972 to August 14, 1973.* Each passenger car manufac-

tured from January 1, 1972, to August 14, 1973, inclusive shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.-1.1.3. A protection system that meets the requirements of S4.1.1.1 or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3.

S4.1.1.1 *First option—complete passive protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.1.1.2 *Second option—lap belt protection system with belt warning.* The vehicle shall—

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.-

209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3.

S4.1.2 *Passenger cars manufactured from August 15, 1973, to August 14, 1975.* Passenger cars manufactured from August 15, 1973, to August 14, 1975, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3. A protection system that meets the requirements of S4.-1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—complete passive protection system.* The vehicle shall meet the crash protection require-

ments of S5 by means that require no action by vehicle occupants.

S4.1.2.2 *Second option—head-on passive protection system.* The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seatbelt assembly; and

(d) At each front outboard designated seating position, have a seatbelt warning system that conforms to S7.3.

S4.1.2.3 *Third option—lap and shoulder belt protection system with ignition interlock and belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a nondetachable upper torso portion that conforms to S7.1 and S7.2 of this standard, a seat belt

warning system that conforms to S7.3, and a belt interlock system that conforms to S7.4;

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2 of this standard, a seat belt warning system that conforms to S7.3, and a belt interlock system that conforms to S7.4;

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 and S7.2 of this standard;

(d) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with the test device restrained by a Type 1 seat belt assembly or a Type 2 seat belt assembly with a nondetachable upper torso portion; and

(e) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1, with an anthropomorphic test device at any front center seating position restrained by a Type 1 or Type 2 seatbelt assembly, experience no complete separation of any load-bearing element of the seatbelt assembly or anchorage.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to Standard No. 209 and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seatbelt warning system that conforms to S7.3, and a belt interlock system that conforms to S7.4.

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S4.5 *Other general requirements.*

S4.5.1 *Labeling and driver's manual information.* Each vehicle shall have a label setting forth the manufacturer's recommended schedule, specified by month and year, for the maintenance or replacement, necessary to retain the performance required by this standard, of any crash-deployed occupant protection system. The label shall be permanently affixed to the vehicle within the passenger compartment and lettered in English in block capitals and numerals not less than three thirty-seconds of an inch high. Instructions concerning maintenance or replacement of the system and a description of the functional operation of the system shall be provided with each vehicle, with an appropriate reference on the label. If a vehicle owner's manual is provided, this information shall be included in the manual.

S4.5.2 *Readiness indicator.* An occupant protection system that deploys in the event of a crash shall have a monitoring system with a readiness indicator. The indicator shall monitor its own readiness and shall be clearly visible from the driver's designated seating position. A list of the elements of the system being monitored by the indicator shall be included with the information furnished in accordance with S4.5.1 but need not be included on the label.

S4.5.3 *Passive belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as a "passive belt") may be used to meet the crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.

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S4.5.3.1 A passive belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

S4.5.3.2 A passive belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

S4.5.3.3 A passive belt furnished pursuant to S4.5.3 shall confrom to S7.1 of this standard, but need not conform to S7.2, S7.3, and S7.4 of this standard.

S4.5.3.4 A passive belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209.

S5. *Occupant crash protection requirements.*

S5.1 *Frontal barrier crash.* When the vehicle, traveling longitudinally forward at any speed up to and including 30 m.p.h., impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, or any any angle up to 30° in either direction from the perpendicular to the line of travel of the vehicle, under the applicable conditions of S8, with anthropomorphic test devices at each designated seating position for which a barrier crash test is required under S4, it shall meet the injury criteria of S6.

S5.2 *Lateral moving barrier crash.* When the vehicle is impacted laterally on either side by a barrier moving at

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20 m.p.h., with test devices at the outboard designated seating positions adjacent to the impacted side, under the applicable conditions of S8, it shall meet the injury criteria of S6.

S5.3 *Rollover.* When the vehicle is subjected to a rollover test in either lateral direction at 30 m.p.h. with test devices in the outboard designated seating positions on its lower side as mounted on the test platform, under the applicable conditions of S8, it shall meet the injury criteria of S6.1. However, vehicles manufactured before Aug. 15, 1977, that conform to the requirements of Standard No. 216 (§ 571.216) need not conform to this rollover test requirement.

EFFECTIVE DATE: The provisions set forth at 36 F.R. 23300, Dec. 8, 1971 affecting S5.3 become effective Aug. 15, 1973.

S6. *Injury criteria.*

S6.1 All portions of the test device shall be contained within the outer surfaces of the vehicle passenger compartment throughout the test.

S6.2 The resultant acceleration at the center of gravity of the head shall be such that the expression:

$$\left[\frac{1}{t_2-t_1}\int_{t_1}^{t_2} a\ dt\right]^{2.5}(t_2-t_1)$$

shall not exceed 1,000, where a is the resultant accleration expressed as a multiple of g (the accleration of gravity), and t^1 and t^2 are any two points in time during the crash.

However, in the case of a vehicle manufactured before August 15, 1975, when the dummy is restrained by a seat belt system, t^1 and t^2 are any two points in time after the head contacts a part of the vehicle other than the belt system.

S6.3 The resultant acceleration at the center of gravity of the upper thorax shall not exceed 60g., except for intervals whose cumulative duration is not more than 3 milliseconds. However, in the case of a vehicle manufactured before August 15, 1975, when the dummy is restrained by a seatbelt system, the resultant acceleration at the center of gravity of the upper thorax shall not exceed a severity index of 1000, calculated by the method described in SAE Information Report J885a, October 1966.

S6.4 The force transmitted axially though each upper leg shall not exceed 1,400 pounds.

S7.1 *Adjustment.*

S7.1.1 Except as specified in S7.1.1.1 and S7.1.1.2, the lap belt of any seat belt assembly furnished in accordance with S4.1.1 and S4.1.2 shall adjust by means of an emergency-locking or automatic-locking retractor that conforms to § 571.209 to fit persons whose dimensions range from those of a 50th-percentile 6-year-old child to those of a 95th-percentile adult male and the upper torso restraint shall adjust by means of an emergency-locking retractor or a manual adusting device that conforms to § 571.209 to fit persons whose dimensions range from those of a 5th-percentile adult female to those of a 95th-percentile adult male, with the seat in any position and the seat back in the manufacturer's nominal design riding position. However,

an upper torso restraint furnished in accordance with S4.1.2.3.1(a) shall adjust by means of an emergency-locking retractor that conforms to Standard No. 209.

S7.1.1.1 A seat belt assembly installed at the driver's seating position shall adjust to fit persons whose dimensions range from those of a 5th-percentile adult female to those of a 95th-percentile adult male.

S7.1.1.2 A seat belt assemby installed at any designated seating position other than the outboard positions of the front and second seats shall adjust either by a retractor as specified in S7.1.1 or by a manual adjusting device that conforms to § 571.209.

S7.1.2 The intersection of the upper torso belt with the lap belt in any Type 2 seat belt assembly furnished in accordance with S4.1.1 or S4.1.2, with the upper torso manual adjusting device, if provided, adjusted in accordance with the manufacturer's instructions, shall be at least 6 inches from the front vertical centerline of a 50th-percentile adult male occupant, measured along the centerline of the lap belt, with the seat in its rearmost and lowest adjustable position and with the seat back in the manufacturer's nominal design riding position.

S7.2 *Latch mechanism.* A seat belt assembly installed in a passenger car shall have a latch mechanism—

(a) Whose components are accessible to a seated occupant in both the stowed and operational positions;

(b) That releases both the upper torso restraint and the lap belt simultaneously, if the assembly has an uppor torso

restraint that requires unlatching for release of the occupant; and

(c) That releases at a single point by a pushbutton action.

S7.3 *Seat belt warning system.* The following provisions shall apply to all seat belt assemblies furnished in accordance with S4.1.1 or S4.1.2, except as provided by S7.3.5 with respect to belt interlock systems furnished in accordance with S4.1.2.3.

S7.3.1 Seat belt assemblies provided at the front outboard seating positions in accordance with S4.1.1 or S4.1.2 shall have a warning system that activates, for at least 1 minute, a continuous or intermittent audible signal and continuous or flashing warning light, visible to the driver, displaying the words "Fasten Seat Belts" or "Fasten Belts" when condition (a) exists simultaneously with either of conditions (b) or (c).

(a) The vehicle's engine is operating and the transmission gear selector is in any forward position.

(b) The driver's lap belt is not in use, as determined, at the manufacturer's option, either by the belt latch mechanism being fastened or by the belt being extended at least 4 inches from its stowed position.

(c) A person of at least the weight of a 50th percentile adult male is seated with the belt fastened at the driver's position, and a person of at least the weight of a 50th percentile 6-year-old child is seated in the right front designated seating position and the lap belt for that position is

not in use, as determined, at the manufacturer's option, either by the belt latch mechanism being fastened or by the belt being extended at least 4 inches from its stowed position.

S7.3.2 The warning system shall either—

(a) Not activate when the lap belt at each occupied front outboard seating position is extended to any length greater than the length necessary to fit a 50th- percentile 6-year-old child when the seat is in the rearmost and lowest adjustment position;

(b) Not activate when the lap belt at each occupied front outboard position is buckled; or

(c) Not activate when the operation specified in (a) or (b) is performed at each occupied front outboard seating position after the occupant is seated.

S7.3.3 The warning systems shall not activate if the vehicle has an automatic transmission, the engine is operating, and the gear selector is in the "Park" position.

S7.3.4 Notwithstanding the provisions of S7.3.1 and S7.3.5.2, when the engine of a vehicle with a manual transmission is operating, the warning system shall either—

(a) Not activate when the transmission is in neutral; or

(b) Not activate when the parking brake is engaged.

S7.3.5 The above provisions of S7.3 shall apply to seat belt assemblies with interlock systems furnished in accordance with S4.1.2.3, with the following exceptions.

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S7.3.5.1 The warning system shall also be provided for the center front seating position, if any.

S7.3.5.2 In addition to the conditions specified in S7.3.1, the warning system shall activate if—

(a) The vehicle's engine is operating and the transmission gear selector is in any forward position, and

(b) A person of at least the weight of a 50th percentile adult male is seated with the belt fastened at the driver's position, and a person of at least the weight of a 5th percentile adult female is seated in a center front designated seating position and the lap belt for the center front position is not in use, as determined, at the manufacturer's option, either by the belt latch mechanism being fastened or the belt being extended at least 4 inches from its stowed position.

S7.3.5.3 The provisions of S7.3.2 shall apply to all front seating positions.

S7.3.5.4 Notwithstanding the other provisions of S7.3, the warning system shall activate whenever the ignition switch is in the "start" position and the operation of the seatbelt systems required by S7.4.1 to start the engine has not been performed.

S7.4 *Belt interlock system.*

S7.4.1 Except as otherwise provided in S7.4.3 and S7.4.4, the engine starting system of a passenger car manufactured in accordance with S4.1.2.3 shall not be operable when either condition (a) or (b) exists, unless the belt

system at each occupied position is operated after the occupant is seated. At each seating position, the operation that allows the starting of the engine shall be, at the manufacturer's option, either the extension of the belt assembly at least 4 inches from its stowed position, or the fastening of the belt latch mechanism.

(a) A person of at least the weight of a 5th percentile adult female is seated at the driver's seating position.

(b) A person of at least the weight of a 50th-percentile adult male is seated at the driver's seating position and a person of at least the weight of a fifth percentile adult female is seated at the center front position or a person of at least the weight of a 50th-percentile 6-year-old child is seated at the right front seating position.

S7.4.2 A belt interlock system furnished in accordance with S7.4.1 shall not affect the operation of the vehicle when the engine is running.

S7.4.4 Notwithstanding the provisions of S7.4.1, an engine starting system may be operable, if after each cycle of the ignition switch from "off" to "on" or "start" and back to "off," a manual switch is operated within the engine compartment.

S7.4.3 Notwithstanding the provisions of S7.4.1, an engine starting system may operate without the interference from a belt interlock system after the engine has stopped if the ignition has not been turned off, or within a period of not more than 3 minutes after the ignition has been turned off, or if the driver has not left his seated position.

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S8. *Test conditions.*

S8.1 *General conditions.* The following conditions apply to the frontal, lateral, and rollover tests.

S8.1.1 The vehicle, including test devices and instrumentation, is loaded as follows:

(a) *Passenger cars.* A passenger car is loaded to its unloaded vehicle weight plus its rated cargo and luggage capacity weight, secured in the luggage area, plus the weight of the necessary anthropomorphic test devices.

S8.1.1(b) *Multipurpose passenger vehicles, trucks, and buses.* A multipurpose passenger vehicle, truck, or bus is loaded to its unloaded vehicle weight plus 300 pounds or its rated cargo and luggage capacity weight, whichever is less, secured in the load carying area and distributed as nearly as possible in proportion to its gross axle weight ratings, plus the weight of the necessary anthropomorphic test devices.

S8.1.2 Adjustable seats are in the adjustment position midway between the forwardmost and rearmost positions, and if separately adjustable in a vertical direction, are at the lowest position.

S8.1.3 Adjustable seat backs are in the manufacturer's nominal design riding position.

S8.1.4 Adjustable steering controls are adjusted so that the steering wheel hub is at the geometeric center of the locus it describes when it is moved through its full range of driving positions.

Appendix E

S8.1.5 Movable vehicle windows and vents are in the fully closed position.

S8.1.6 Convertibles and open-body type vehicles have the top, if any, in place in the closed passenger compartment configuration.

S8.1.7 Doors are fully closed and latched but not locked.

S8.1.8 Anthropomorphic test devices conform to the requirements of SAE Recommended Practice J963, June 1968, and have a pelvic structure that conforms to Figure 1. The weights, dimensions and centers of gravity specified in SAE J963 for the test device segments are determined with all instrumentation in place.

S8.1.9 Each test device is clothed in form-fitting cotton stretch garments.

S8.1.10 Limb joints are set at 1g, barely restraining the weight of the limb when extended horizontally. Leg joints are adjusted with the torso in the supine position. Articulated head, neck, and torso joints do not move at a horizontal acceleration load of 1g, in the test position, but move at a horizontal acceleration load of 2g.

S8.1.11 Each test device is firmly placed in a designated seating position in the following manner.

(a) The head is aligned by placing the test device on its back on a rigid, level surface and by adjusting the head so that it touches the level surface and is laterally centered with respect to the device's axis of symmetry.

(b) The test device is placed in the vehicle in the normal upright sitting posture, and a rigid roller, 6 inches in diameter and 24 inches long, is placed transversely as low as possible against the front of the torso.

(c) The roller is pressed horizontally against the torso with a force of 50 pounds.

(d) Force is applied at the shoulder level to bend the torso forward over the roller, flexing the lower back, and to return the test device to the upright sitting posture.

(e) The roller is slowly released.

S8.1.12 Except as otherwise herein specified, the test devices are not restrained during impacts by any means that require occupant action.

S8.1.13 The hands of the test device in the driver's designated seating position are on the steering wheel rim at the horizontal centerline. The right foot rests on the undepressed accelerator pedal, with the heel in contact with the point where the centerline of the upper surface of the undepressed accelerator pedal intersects the upper surface of the floor covering. The left leg is placed as in S8.1.14.

S8.1.14 The hands of each other test device are resting on the seat with the palms touching the legs, and the upper arms are resting against the seat back and flush with the body. Where possible, the legs are outstretched, with the thighs on the seat and the heels touching the floor with the foot at 90° to the tibia. Otherwise, the tibia are vertical with the feet resting on the floor. The left leg of a test device in the center front designated seating position is

on the vehicle centerline, and the right leg is in the right footwell. The left and right legs of a test device in the center rear designated seating position are in the left and right footwells, respectively.

S8.1.15 A load sensing device is installed in each upper leg, 4.25 inches from the knee's axis of rotation, so that all force transmitted from the knee to the upper leg is measured.

S8.1.16 Acceleration sensing devices are installed in each test device to measure orthogonal accelerations at the center of gravity of the head and upper thorax.

S8.1.17 The output of acceleration and loading sensing devices is recorded in individual data channels that conform to the requirements of SAE Recommended Practice J211, October 1970, with channel classes as follows:

(a) Head acceleration—1,000 Hz.

(b) Upper thorax acceleration—180 Hz.

(c) Upper leg force—600 Hz.

S8.1.18 The sensing devices are rigidly attached to the test devices by mountings that have no resonance frequency within the frequency-range of the specified channel class.

S8.1.19 Instrumentation does not affect the motion of test devices during impact or rollover.

S8.2 *Lateral moving barrier crash test conditions.* The following conditions apply to the lateral moving barrier crash test.

Appendix E

S8.2.1 The moving barrier, including the impact surface, supporting structure, and carriage, weighs 4,000 pounds.

S8.2.2 The impact surface of the barrier is a vertical, rigid, flat rectangle, 78 inches wide and 60 inches high, perpendicular to its direction of movement, with its lower edge horizontal and 5 inches above the ground surface.

S8.2.3 During the entire impact sequence the barrier undergoes no significant amount of dynamic or static deformation, and absorbs no significant portion of the energy resulting from the impact, except for energy that results in translational rebound movement of the barrier.

S8.2.4 During the entire impact sequence the barrier is guided so that it travels in a straight line, with no significant lateral, vertical or rotational movement.

S8.2.5 The concrete surface upon which the vehicle is tested is level, rigid and of uniform construction, with a skid-number of 75 when measured in accordance with American Society for Testing and Materials Method E-274-65T at 40 m.p.h., omitting water delivery as specified in paragraph 7.1 of that method.

S8.2.6 The tested vehicle's brakes are disengaged and the transmission is in neutral.

S8.2.7 The barrier and the test vehicle are positioned so that at impact—

(a) The vehicle is at rest in its normal attitude;

(b) The barrier it traveling in a direction perpendicular to the longitudinal axis of the vehicle at 20 m.p.h.; and

(c) A vertical plane through the geometric center of the barrier impact surface and perpendicular to that surface passes through the driver's seating reference point in the tested vehicle.

S8.3 *Rollover test conditions.* The following conditions apply to the rollover test.

S8.3.1 The tested vehicle's brakes are disengaged and the transmission is in neutral.

S8.3.2 The concrete surface on which the test is conducted is level, rigid, of uniform construction, and of a sufficient size that the vehicle remains on it throughout the entire rollover cycle. It has a skid number of 75 when measured in accordance with American Society of Testing and Materials Method E-274-65T at 40 m.p.h. omitting water delivery as specified in paragraph 7.1 of that method.

S8.3.3 The vehicle is placed on a device, similar to that illustrated in Figure 2, having a platform in the form of a flat, rigid plane at an angle of 23° from the horizontal. At the lower edge of the platform is an unyielding flange, perpendicular to the platform with a height of 4 inches and a length sufficient to hold in place the tires that rest against it. The intersection of the inner face of the flange with the upper face of the platform is 9 inches above the rollover surface. No other restraints are used to hold the vehicle in position dur-

ing the deceleration of the platform and the departure of the vehicle.

S8.3.4 With the vehicle on the test platform, the test devices remain as nearly as possible in the posture specified in S8.1.

S8.3.5 Before the deceleration pulse, the platform is moving horizontally, and perpendicularly to the longitudinal axis of the vehicle, at a constant speed of 30 m.p.h. for a sufficient period of time for the vehicle to become motionless relative to the platform.

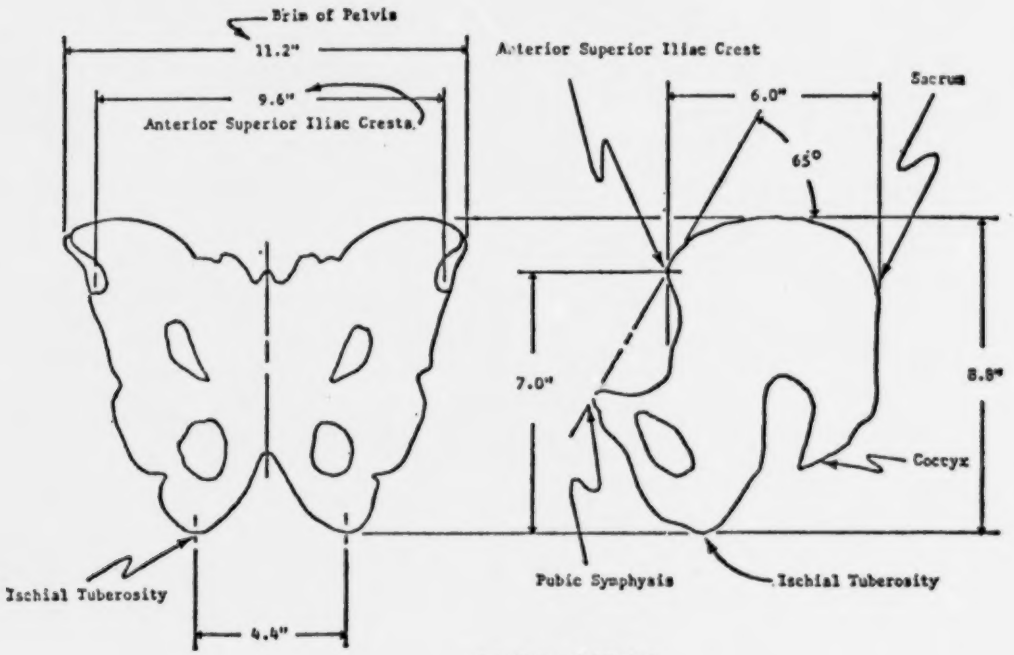
S8.3.6 The platform is decelerated from 30 to 0 m.p.h. in a distance of not more than 3 feet, without change of direction and without transverse or rotational movement during the deceleration of the platform and the departure of the vehicle. The deceleration rate is at least 20g for a minimum of 0.04 seconds.

S9 *Pressure vessels and explosive devices.*

S9.1 *Pressure vessels.* A pressure vessel that is continuously pressurized shall conform to the requirements of §§ 178.65-2, 178.65-6(b), 178.65-7, 178.65-9(a) and (b), and 178.65-10 of this title. It shall not leak or evidence visible distortion when tested in accordance with § 178.65-11(a) of this title and shall not fail in any of the ways enumerated in § 178.65-11(b) of this title when hydrostatically tested to destruction. It shall not crack when flattened in accordance with § 178.65-12(a) of this title to the limit specified in § 178.65-12(a)(4) of this title.

Appendix E

S9.2 *Explosive devices.* An explosive device shall not exhibit any of the characteristics prohibited by § 173.51 of this title. All explosive material shall be enclosed in a structure that is capable of containing the explosive energy without sudden release of pressure except through overpressure relief devices or parts designed to release the pressure during actuation.



PELVIC SECTION

50TH PERCENTILE MALE ANTHROPOMORPHIC TEST DEVICE

FIGURE I

NOTE: The concept of an occupant protection system that requires "no action by vehicle occupants" as used in Standard No. 208 is intended to designate a system that requires no action other than would be required if

the protective system were not present in the vehicle. Under this interpretation the concept does not include "forced action" systems as described above.

This interpretation is not intended to rule out the possibility that further rulemaking action may be taken in the future to permit such systems in certain cases.

[Figure 2, "Typical Device for Rollover Test," Omitted.]

[36 F.R. 22902, Dec. 2, 1971, as amended at 36 F.R. 23300, Dec. 8, 1971; 36 F.R. 23725, Dec. 14, 1971; 37 F.R. 3912, Feb. 24, 1972; 37 F.R. 9223, May 6, 1972; 37 F.R. 12393, June 23, 1972; 37 F.R. 13266, July 6, 1972; 37 F.R. 16186, Aug. 11, 1972]

APPENDIX F

Federal Motor Vehicle Safety Standard 214, 49 C.F.R. §571.214

§ 571.214 Standard No. 214; Side door strength.

S1. *Purpose and scope.* This standard specifies strength requirement for side doors of a motor vehicle to minimize the safety hazard caused by intrusion into the passenger compartment in a side impact accident.

S2. *Application.* This standard applies to passenger cars.

S3. *Requirements.* Each vehicle shall be able to meet the following requirements when any of its side doors that can be used for occupant egress are tested according to S4.

S3.1 *Initial crush resistance.* The initial crush resistance shall be not less than 2,250 pounds.

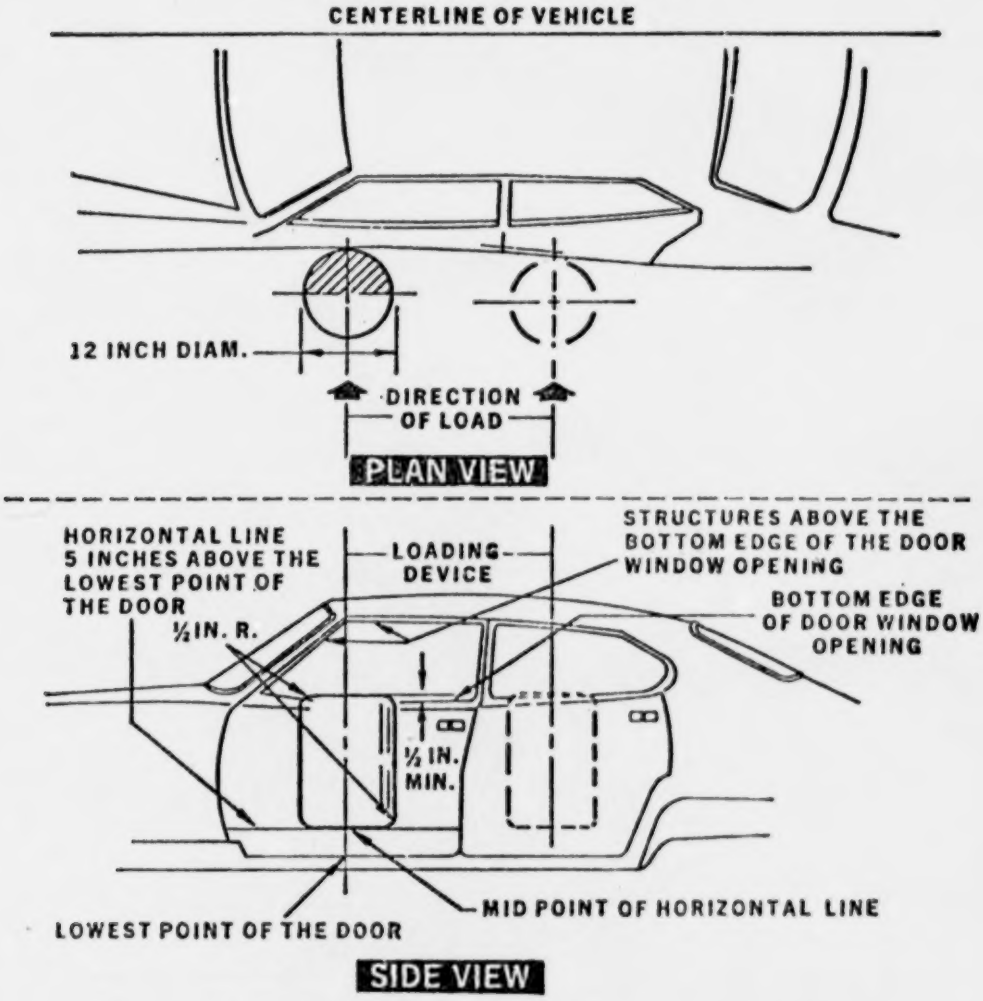
S3.2 *Intermediate crush resistance.* The intermediate crush resistance shall not be less than 3,500 pounds.

S3.3 *Peak crush resistance.* The peak crush resistance shall be not less than two times the curb weight of the vehicle or 7,000 pounds, whichever is less.

S4. *Test procedures.* The following procedures apply to determining compliance with section S3:

(a) Remove from the vehicle any seats that may affect load upon, or deflection of, the side of the vehicle. Place side windows in their uppermost position and all doors

in locked position. Place the sill of the side of the vehicle opposite to the side being tested against a rigid unyielding vertical surface. Fix the vehicle rigidly in position by means of tiedown attachments located at or forward of the front wheel centerline and at or rearward of the rear wheel centerline.



LOADING DEVICE LOCATION AND APPLICATION TO THE DOOR

FIGURE 1

(b) Prepare a loading device consisting of a rigid steel cylinder or semicylinder 12 inches in diameter with an edge radius of one-half inch. The length of the loading device shall be such that the top surface of the loading device is at least one-half inch above the bottom edge of the door window opening but not of a length that will cause contact with any structure above the bottom edge of the door window opening during the test.

(c) Locate the loading device as shown in Figure 1 (side view) of this section so that:

(1) Its longitudinal axis is vertical;

(2) Its longitudinal axis is laterally opposite the midpoint of a horizontal line drawn across the outer surface of the door 5 inches above the lowest point of the door;

(3) Its bottom surface is in the same horizontal plane as the horizontal line described in paragraph (2) of this paragraph; and

(4) The cylindrical face of the device is in contact with the outer surface of the door.

(d) Using the loading device, apply a load to the outer surface of the door in an inboard direction normal to a vertical plane along the vehicle's longitudinal centerline. Apply the load continuously such that the loading device travel rate does not exceed one-half inch per second until the loading device travels 18 inches. Guide the loading device to prevent it from being rotated or displaced from its direction of travel. The test must be completed within 120 seconds.

Appendix F

(e) Record applied load versus displacement of the loading device, either continuousy or in increments of not more than 1 inch or 200 pounds for the entire crush distance of 18 inches.

(f) Determine the initial crush resistance, intermediate crush resistance, and peak crush resistance as follows:

(1) From the results recorded in paragraph (e) of this paragraph, plot a curve of load versus displacement and obtain the integral of the applied load with respect to the crush distances specified in subdivisions (2) and (3) of this paragraph. These quantities, expressed in inch-pounds and divided by the specified crush distances, represent the average forces in pounds required to deflect the door those distances.

(2) The initial crush resistance is the average force required to deform the door over the initial 6 inches of crush.

(3) The intermediate crush resistance is the average force required to deform the door over the initial 12 inches of crush.

(4) The peak crush resistance is the largest force recorded over the entire 18-inch crush distance.

APPENDIX G

Excerpts from the Trial Testimony of Dr. Steven C. Batterman, an Expert Witness Called by Respondents

Q. Well, let's take your parameter frame car with the cross-members. Have you made any calculations as to what the invasion or protrusion into the car would have been, had the car been constructed as you say was practical and feasible in 1971?

A. Yes, I do. I did base it on my calculations for a frame which was a full perimeter frame and whose dimensions were suggested to me from the Ford frame here and I am not suggesting that's going to be suitable for the entire range of impact. I calculated that the deflection or the bending and intrusion, if that's what you want to call it, it would have been less than nine inches in this impact.

Q. Is that when you're talking about nine inches, incidentally, so we understand or at least I understand it—

A. Excuse me. I mean 9.9. Let me say less than ten inches, to correct myself.

Court of Appeals Appendix for Appellant, p. 1755a, lines 1-19.

* * *

Q. Now, is crush beneficial to the occupant of a vehicle?

A. It's beneficial if the area which is being crushed doesn't intrude into his survival space and so injure him.

Q. That's right. If it doesn't intrude and injure him, is that correct?

A. That is correct.

Q. Now in your testimony you have talked about a nine inch crush, isn't that correct?

A. Yes. I said there are frames which can be designed where there would only be nine or nine or ten inches of crush.

Appendix G

Q. You can design a vehicle not saying what speed it will go or how much gas it will consume or anything like that, where the crush would be limited to almost to zero, isn't that correct?

A. Might be possible to do that but that would then perhaps create other problems.

Q. So on one hand no crush is no good, is that right?

A. Well, it's a complicated question.

Q. I know it is.

A. Because you don't only have to provide the energy absorbing capability by crushing the vehicle structure, you can provide the interior package of the occupants differently. But, in general, first of all, there is no thing that a structure won't crush but, if you don't allow some capability of energy-absorption and you change the direction of motion of the vehicle, you might be subject in the vehicle to high deceleration motion.

Q. Now, even on your situation with a nine inch crush, that, for example, taking your vehicle that you say is okay and if you had a situation in which that vehicle impacted a pole right where the person was sitting and came in nine inches for that person, that nine inches wouldn't be any good, would it?

A. I did not subject my vehicle to that kind of an analysis. I took the analysis which is similar to this impact.

Q. I'm going to take your vehicle and take another factual situation, your nine inch crush wouldn't be any good for that person, would it?

A. It might not be. Could be injurious.

Court of Appeals Appendix for Appellant, p. 1901a, line 2 through p. 1903a, line 2.

APPENDIX H

United States Constitution
art. VI, cl.2 and art. I, § 8, cl.3

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl.2.

The Commerce Clause provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

U.S. Const., art. I, § 8, cl.3.

No. 80-1026

In The

Supreme Court of the United States

October Term, 1980

CHRYSLER CORPORATION,

Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the National Traffic and Motor Vehicle Act preclude recovery against automobile manufacturers under a state's common law?

Answered negatively by the courts below.

2. Does Chrysler's failure to raise the issue of compliance or noncompliance with the National Traffic and Motor Vehicle Act during trial preclude it from raising the issue on appeal?

Answered affirmatively by the courts below.

3. Does a verdict based upon a state's application of its contract law present any question of federal law?

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No. 80-1026

In The

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Richard F. Dawson and Diana Dawson, individually and Diana Dawson as parent and natural guardian of Bryan Dawson, a minor, respectfully pray the petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed on September 11, 1980 be denied.

OPINIONS BELOW

The opinion of the United States District Court of New Jersey is unreported and contained in Appendix A.

STATEMENT OF THE CASE

On September 7, 1974, Pennsauken, New Jersey Police Officer Richard Dawson sustained crippling injuries when his police car hydroplaned on a wet road and slid sideways into a metal pole. The impact speed was minor, 25 to 30 mph. Officer Dawson's car, a 1974 Dodge Monaco, had been advertised by Chrysler as a police pursuant car. Chrysler's brochure on this car made numerous claims of features allegedly unique to its Dodge Monaco police pursuit car, including heavier walled exhaust manifold; top performing Magnum 440 4-barrel V-8 engine; special handling package; heavy-duty police brakes; special power steering unit; torque flite transmissions for police application; new thermal torque fan drive; spool type engine mounts; extra-capacity tandem brake booster; a new 9¼ inch axle assembly; heavy-duty front torsion bars; front sway bar; special heavy-duty rear leaf seats; special isolators; unibody construction where its structural members are welded into a single unit to enhance its rugged construction; and a speedometer, certified calibrated to 140 mph.

Despite these claims, Herman Smith, Chrysler's chief of design for the bodies of Chrysler cars, testified at trial that Chrysler did no special design work for police cars (17a).

Initial point of impact with the pole was the left rear driver's side wheel well. The car, which was moving rearward, slid along the rear frame until it came to a 17 inch gap between the rear frame member and the front frame members. At that point, the car deformed around the pole, allowing the pole to rip into the passenger compartment, forcing the front seat and

Office Dawson toward the front of the vehicle until Officer Dawson's head forcibly contacted the header area. The impact caused bursting fractures of the fifth and sixth vertebra which have rendered Officer Dawson a quadraplegic.

Suit was instituted on behalf of the Dawsons in Pennsylvania State Court alleging that Chrysler was liable on two theories. First, that the design of the frame of the car was defective and Chrysler was, therefore, liable under common law principles of products liability. Second, that Chrysler breached its implied warranty to deliver a vehicle fit for the particular purpose of a police pursuit vehicle. Chrysler removed the case to the Eastern District of Pennsylvania. Then it was transferred to the District Court for the District of New Jersey where it was tried, applying New Jersey substantive law.

Under New Jersey law, the proofs required under strict tort liability and implied contractual warranty are identical. A plaintiff must prove that the product was defective and a proximate cause of injuries, and that feasible alternative design would have prevented these same injuries. In making this determination, New Jersey requires a balancing of numerous factors:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole;

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury;

(3) The availability of a substitute product which would meet the same need and not be as unsafe;

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;

(5) The user's ability to avoid danger by the exercise of care in the use of the product;

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions;

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

At trial, a design analyst, a mechanical engineer and a biochemical engineer, agreed that the Dodge frame was totally inadequate with respect to side impacts and that a well known design alternative would have prevented Officer Dawson's injuries.

The cornerstone of Chrysler's brief rests on certain allegations with respect to this alternative design which are untrue. First, Chrysler would have this Court believe that there was evidence that the alternative design did not comply with federal standards. This is not true. As the Third Circuit noted:

> "There was no suggestion at trial that the alternative design recommended by the Dawsons would not comply with Federal safety standards." (Pet. Br. 16a).

Second, Chrysler would have this Court believe that this alternative design was untested and concocted solely for this case. This is untrue. The alternative design consisted of a cross member between the B-posts (B-post is the post or pillar between the front and rear seats) of a continuous frame. Continuous frames had been in existence for over thirty years. In 1974, 84% of the cars made in America had full frames. The addition of a

cross member to a full frame had been designed, tested and evaluated in 1969 and 1973 in tests conducted under the auspices of the United States Department of Transportation. Those results demonstrated dramatic increases in passenger protection with passenger compartment penetration reduced up to 71%. These same studies evaluated the performance of this alternative design in other impact modes and concluded:

> "It is believed that frame cross members can be effectively utilized for transferring load and dissipating energy in side collisions could be integrated with a front structure designed to control collapse in frontal impacts." (27a).

> "The need for more protective side structures was demonstrated in a directly related project effort (reported in Reference 1), in which side impact tests of conventional (unmodified) automobiles were performed. From these 'base line' tests, as well as from statistical accident data, it became abundantly clear that today's automobile generally does not offer adequate occupant protection in collisions where the principal impact loads are imposed on the side of the occupant compartment.

> Strengthening vehicle side structures, in addition to providing more effective occupant protection, can be a particularly attractive design feature since these structures do not have the potential for increasing collision 'aggressiveness' with respect to occupants of other involved vehicles, or to struck pedestrians, as may be the case for modified front structures. Furthermore, enhancing side impact crashworthiness might be a natural first step in the evolution of more

> crashworthy automobiles structures, in anticipation of front structure modifications introduced in the future that could further aggravate the side collision vulnerability problem. *It should also be noted that improved side structures could also benefit occupants in rollover accidents.*" (Emphasis added, 33a).

Chrysler would also have this Court believe that the federal motor vehicle safety standards call for certain design parameters which plaintiff's alternative design failed to meet. This is untrue. At trial, Chrysler never questioned whether the alternative design complied with federal regulations. (Since it was a minor modification to an existing frame and outperformed Chrysler's vehicles, it obviously would have complied.) Furthermore, the regulations do not specify design parameters. They merely list certain maximum forces a person's body may be subjected to in side impacts. They do not tell a manufacturer what design to use to meet these requirements. Theoretically, any configuration of design would meet these regulations as long as the person in the vehicle did not experience loads exceeding the calculated limits in a 20 mph impact.

At the conclusion of the trial, the jury concluded that (1) the body structure of the 1974 Dodge Monaco was defective and unreasonably dangerous; (2) Chrysler breached its implied warranty that the vehicle would be fit for use as a police car; (3) as a result of the defect and breach of warranty, Office Dawson sustained injuries he would not have sustained had the alternative design been utilized. Contrary to Chrysler's assertion, the jury did not set up a safety standard which varied from federal requirements. It merely concluded that Chrysler's design, one of many which could have complied with federal minimal requirements, was defective. The verdict was sustained by the District Court and by the Third Circuit Court of Appeals. Chrysler's petition for a rehearing was summarily denied.

SUMMARY OF ARGUMENT

This case presents no important question of federal law nor is there any conflict between federal courts of appeals with respect to any issues raised by Chrysler. The National Traffic and Motor Vehicle Safety Act does not preclude common law actions as it specifically states:

> "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under Common Law." 15 U.S.C. §1397(c).

Federal preemption is not presumed. It must be clearly stated. This is especially so where the federal regulation has no mechanism for the enforcement of individual rights for personal harm. Congress has clearly intended that automobile manufacturers are subject to suits at common law.

The record does not support Chrysler's allegation that respondents' alternative design (a necessary element of proof under New Jersey law) did not comply with federal standards. In fact, the standards Chrysler relies on do not set design parameters. They specify maximum forces a passenger may be subjected to when side-impacted under certain test conditions at 20 mph. None of the federal regulations deal with the question of passenger compartment penetration. The only federally sanctioned tests dealing with passenger compartment penetration in side impacts specifically approved respondents alternative design and commented on its overall reliability in front impacts and rollovers.

Congressional purpose is not thwarted by a continuation of common law liability. Any number of designs can comply with federal regulations and yet be unsafe. A design which kept forces to acceptable levels yet exposed passengers to sharp protrusions

in the passenger compartment would obviously be unsafe. Just as defective is the design of this 1974 Dodge Monaco police pursuit car which permitted a pole to knife into the passenger area rendering this officer a quadraplegic. Congress has stated that this officer's redress is through common law liability. This Court has no choice but to follow that mandate.

Petitioner ignores the fact that this jury found that Chrysler breached its contractual duty to deliver a vehicle fit to be a police pursuit car. That duty would not be subject to the same arguments made with respect to preemption as the Act provides:

> "Nothing in this section shall be construed to prevent the Federal Government or the government of any state or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard." (15 U.S.C. §1392(d).

The jury concluded under New Jersey law that Chrysler breached this contractual duty to build and sell a police pursuit car. The fact that the car complied with federal requirements for passenger vehicles would be irrelevant since the Act specifically permits higher standards for cars procured for the use of a political subdivision of a state. This question is purely one of applying a state's contract laws and not be subject to review by this Court as no federal questions are presented.

REASONS FOR DENYING THE WRIT

I.

THE NATIONAL TRAFFIC AND MOTOR VEHICLE ACT DOES NOT PRECLUDE RECOVERY AGAINST AN AUTOMOBILE MANUFACTURER UNDER A STATE'S COMMON LAW.

A. Preemption

When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause of Article VI. But Congress does not typically act on a wholesale basis, and congressional entry into a field does not necessarily end all state authority. In considering preemption, it is vital to bear in mind an observation in Hart and Wachsler, *The Federal Courts and the Federal System*, 435 (1953):

> "Federal law is generally interstitial in nature. It rarely occupies a legal field completely . . . . Federal legislation on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objections. It builds upon legal relationships established by the states, altering or surplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the same way that a state legislature acts against the background of common law, assumed to govern unless changed by legislation."

The legal background surrounding the National Traffic and Motor Vehicle Act (hereinafter referred to as the Act) included common law principles of products liability and breach of

warranty. Both of these concepts were well known methods of attacking the design of an automobile when the Act was passed and became law. Congress, fully aware of these principles of attacking an automobile's design, specifically provided that they would continue after the Act became law:

> "Compliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C.A. §1397(c).

The legislative history of the Act confirms that it was not intended to restrict common law liability.

> "Moreover, the federal minimum safety standards need not be interpreted as restricting state common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." U.S. Code Cong. and Admin. News, 2720 (1966).

Lower courts that have dealt with the question of preemption under the Act have unanimously agreed that common law liability continues.

> "General Motors contends that any safety standards in design and equipment should be imposed as envisioned by the National Traffic and Motor Vehicle Safety Act of 1966 (Pub. L. 89-563), 80 Stat. 718, 15 U.S.C.A. §1381 et seq. Recognizing the need to reduce traffic accidents and deaths and injuries resulting therefrom, Congress found it necessary to establish motor vehicle safety standards, and by this Act set up

the machinery and administrative process to establish minimum safety standards. The purpose of this Act is manifest and the Congress recognizes in §1391(1) that the public should be protected against unreasonable risks of accidents occurring as a result of the design, construction or performance of motor vehicles and also be protected against unreasonable risk of death or injury in the event accidents do occur. Section 108(c) of the Act, 15 U.S.C. §1397(c), expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves the common law liability intact. Subsection (c) reads: '(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.'

It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards or the courts expend the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability. *Larson v. General Motors*, 391 F. 2d 495, 506 (8th Cir. 1968).

Compliance with the safety standards promulgated pursuant to the National Traffic and Motor Vehicle Safety Act, however, does not relieve Chrysler of liability in this action. For in authorizing the Secretary of Transportation to enact these standards, Congress explicitly provided, 'Compliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.' 15 U.S.C. §1397(c)(1976). *Dawson v. Chrysler,* ___ F.2d ___ (3rd Cir. 1980) [Pet. Br. 14a].

Finally, defendant argues that the national character of the automobile industry dictates that automobile design not be subject to piecemeal regulation by different juries in different states. Defendant argues that the problem of designing safe cars is for the Congress, not state courts, and that federal safety regulations established by the National Highway Traffic Administration, pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, pre-empt the field of automobile safety regulation thus rendering state courts powerless to act in this area. Defendant completely overlooks, however, 15 U.S. Code, sec. 1397(c), which provides as follows:

> 'Continuation of common law liability vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.'

Thus Congress felt that federal regulations should be supplementary to the common law of

> products liability. Defendant's argument that the problem of automobile design is exclusively legislative must therefore be rejected. *Arbet v. Gussarson*, 66 Wis. 2d 551, 561, 562, 255 N.W. 2d 431 (1975). In accord, *Volkswagon v. Young*, 272 Md. 201, 321 A. 2d 737 (1974); *Buccery v. General Motors*, 132 Cal. App. Rptr. 605, 60 Cal. App. 3rd 533 (1976); *Roberts v. May*, 583 P. 2d 305 (Colo. App. 1978) Cert. Den. 8/28/78."

Against this overwhelming statement of congressional intent, Chrysler would have this Court hold that Congress implied preemption by the mere passage of a national act. This is not so. Even the case Chrysler relies upon recognizes that common law recovery under traditional tort concepts may continue in an extremely federally regulated field.

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Russell, 356 U.S. 634, 78 S. Ct. 932 2 L. Ed. 2d 1030; United Construction Workers, etc. v. Laburnum Const. Corp., 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. We have also allowed the States to enjoin such conduct. Youngdahl v. Rainfair, Inc., 355 U.S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151; United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Wisconsin Employment Relations Board, 351 U.S. 266, 76 S. Ct. 794, 100 L. Ed. 1162. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our

> federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in United Construction Workers, etc. v. Laburnum Const. Corp., 347 U.S. 656, 74 S. Ct. 833, 835, 98 L. Ed. 1025, found support in the fact that the state remedy had no federal counterpart." *San Diego Building Trades Council v. Garmen,* 359 U.S. 236, 247, 79 S. Ct. 773, 781 (1953).

In determining whether there is preemption, this Court must determine whether Congress provided mechanism under the federal Act to award damages. If such a mechanism exists and is in conflict with the common law mechanism, then there is preemption.

> "In Laburnum, in distinguishing Garner v. Teamsters, etc. Union, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, we said:
>
> > 'To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that

> if no conflict had existed, the state procedure would have survived.' 347 U.S. at page 665, 74 S. Ct. at page 838." *International Union v. Russell*, 356 U.S. 634, 644, 78 S. Ct. 932, 938 (1958).

The *International* Court, in an example delineated the nature of the legislative language which would have to exist to preempt a common law recovery for tort damages:

> "The situation may be illustrated by supposing, in the instant case, that Russell's car had been turned over resulting in damage to the car and personal injury to him. Under state law presumably he could have recovered for medical expenses, pain and suffering and property damages. Such items of recovery are beyond the scope of present Board remedial orders. Following the reasoning adopted by us in the Laburnum case, we believe that state jurisdiction to award damages for these items is not preempted. Cf. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 78 S. Ct. 923. Nor can we see any difference, significant for present purposes, between tort damages to recover medical expenses and tort damages to recover lost wages. We conclude that an employee's right to recover, in the state courts, all damages caused him by this kind of tortious conduct cannot fairly be said to be preempted without a clearer declaration of congressional policy than we find here." *Id.* at U.S. 645, 646, S. Ct. 939.

The National Traffic and Motor Vehicle Act does not provide any mechanism for an individual to recover for personal injuries resulting from the defective design of an automobile.

The only enforcement mechanism under the Act calls for an imposition of a fine on the manufacturer for failure to comply with the minimum standards set forth by the Act. 15 U.S.C.A. §1415.

The Act does not state that common law is preempted. It states that common law shall continue. There is, therefore, no preemption.

B. Frustration of Congressional Purpose

Chrysler's argument with respect to congressional purpose and interstate commerce are predicated upon a conclusion that respondents' alternative design did not comply with federal standards. This conclusion is unsupported by the record and was never raised at trial. Both the District Court and the Third Circuit Court of Appeals have held that Chrysler has waived this argument. (This topic will be treated in Point II.) Chrysler has, therefore, waived any argument predicated upon this conclusion.

Chrysler would have this Court believe that the jury in this case adopted a standard of design which conflicts with federal standards. This is not true. Under New Jersey substantive law, a plaintiff must prove the defective design and an alternative design which would eliminate the injuries the defect caused. *Huddell v. Levin,* 537 F. 2d 726 (3rd Cir. 1976).

Respondents, therefore, presented evidence of a well known design alternative which would substantially improve the Dodge Monaco police pursuit vehicles' performance in impacts. Contrary to Chrysler's argument, this design was not concocted solely for this accident. The poor performance of automobiles in side impacts was well known in the industry prior to the Dawson accident. In 1969 and 1973, the United States Department of Transportation commissioned tests to determine the

performance of alternative designs in side impacts. These tests (which postdated the Act) used minor cross member modifications to existing full frames used by General Motors and Ford. The tested designs were substantially identical to that urged by respondents. These tests (which were the only U.S. sanctioned tests produced at trial) demonstrated that these design modifications (a) reduced passenger compartment penetration by up to 71%; (b) were compatible with a front structure designed to control collapse; and (c) benefited occupants in rollover accident (18a-36a). Chrysler's statement ". . . by permitting respondents to establish a *prima facie* case of automobile design that would allegedly improve only a single feature of vehicle performance (*i.e.*, protection in side impact collisions with a stationary object) without requiring the presentation of any proof of (1) the effect of the proposed design change on crashworthiness in other types of accidents and (a) the compatibility of the design change with existing mandatory federal motor vehicle standards." (Pet. Br. 8) is totally untrue and can only be an intentional misstatement of the case, in view of what the Third Circuit noted:

> "There was no suggestion at trial that the alternative design recommended by the Dawsons would not comply with Federal safety standards." (Resp. Br. 16a).

The Act does not set design parameters. It merely sets forth maximum loads that passengers may be subject to at side impacts under certain conditions at 20 mph. There is no mention in the Act of frame design or passenger compartment penetration. 40 C.F.R. 571.208; 571.214. Ford, General Motors, a myriad of foreign cars and Chrysler all utilize different designs and all comply with the Act. Forcing Chrysler to pay damages for the failure to use a well known safer design which also complies with the Act is no more of a hindrance on congressional purpose or interstate commerce than permitting the various manufacturers to choose different designs.

Congress' purpose is best determined by the wording of the Act and the legislative background of the Act. 15 U.S.C. §1391(2) defines "Motor Vehicle Safety Standards" as

> "A *minimum* standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." (Emphasis added.)

The Act only provides minimum standards with which the manufacturer must comply. There is no mention in the Act of remedies for personal injuries or that compliance with the Act relieves a manufacturer of liability. To the contrary, the Act provides that common law liability will continue. Clearly, the purpose of the Act was not to limit a manufacturer's liability by eliminating automobile products liability lawsuits. The purpose was to set minimum safety standards to supplement continuing common law liability.

The Court of Appeals' concern with the possibility of different juries setting standards that conflict with federal purposes is unfounded and predicated in part upon Chrysler's false allegation that respondents' alternative design did not comply with federal regulations.

In an opinion letter from the National Highway Traffic Safety Administration, the Office of Chief Counsel, explains that the Act does not set forth design standards and were not meant to limit the designs available.

> "As explained below, Federal motor vehicle safety standards allow manufacturers latitude to develop a variety of designs to comply with the performance requirements set in the standards. In addition, compliance with a Federal motor

vehicle safety standard does not constitute a defense in a product liability suit.

* * *

Each of our safety standards meets the need for motor vehicle safety by specifying requirements for the performance of a particular vehicle system or item of equipment. For example, Standard No. 214, *Side Door Strength,* cited in your letter, sets certain crush resistance requirements that a passenger car must meet in static load test. It does not require the use of a specific design. Thus, manuafacturers need not use the most effective design available. They may use any design that will satisfy the performance requirements of the standard.

It also does not require that manufacturers limit their chosen design to the performance levels specified in the standard. The performance requirements are minimum, not maximum, ones. Manufacturers are free to select designs which exceed those in the safety standards.

Although our safety standards meet the need for safety, they do not necessarily attempt to solve the full extent of a particular safety problem. The static test requirements of Standard No. 214 are a prime example. Compliance with those requirements has yielded some significant benefits. However, large numbers of persons continue to be killed or seriously injured in side impact crashes. Accordingly, the agency issued an advance notice of proposed rulemaking (44 FR 70204; December 6, 1979) to explore the

possibility of replacing the existing laboratory tests with dynamic tests that simulate actual side crashes. (A copy of the notice is enclosed.)

In recognition of the foregoing factors, Congress has provided that compliance with a safety standard does not constitute a defense in a product liability suit. Section 108(c) (15 U.S.C. 1397(c)) of the Act provides that compliance with a motor vehicle safety standard 'does not exempt any person from liability under common law.' The House Report (H.R. Rep. No. 1776, 89th Cong. 2d Sess. (1966)) on section 108(c) states that, 'It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.'

Likewise, compliance with a Federal motor vehicle safety standard does not presumptively mean that the design chosen by a manufacturer is safe. Congress gave the agency the authority to order manufacturers to notify owners about safety-related defects in their vehicles and to remedy those defects (15 U.S.C. 1411-1420). On occasion, the agency has required manufacturers to conduct defect notification and remedy campaigns even though the vehicle complied with applicable Federal motor vehicle safety standards." (37a-39a).

The opinion letter relied upon by Chrysler is another attempt to mislead this Court. As explained by the Chief Counsel, that opinion letter has no relevance to this case and was not intended to condone limitation of common law liability.

> "Finally, the agency's interpretation letter of November 3, 1978, cited in your letter, does not interpret section 108(c) of the Act. The letter, a copy of which is enclosed, involved the issue of whether a California motor vehicle regulation was preempted under section 103(d) (15 U.S.C. 1392(d)) of the Act by a Federal motor vehicle safety standard. Section 103(d) is limited to the effect of Federal standards on State regulations covering the same aspects of performance. Section 108(c) of the Act governs the effect of Federal standards on product liability suits." (39a, 40a).

Even if this Court were to agree with the lower court's concern with the possiblity of future ill effects, it would not be a basis for granting certioriori. The Supreme Court will not predicate its finding on hypothetical possibilities. A real conflict must exist before a case is reviewed. The lower court's concern about future possibilities does not constitute such a conflict.

> ". . . we see no reason to strike down otherwise valid portions of the Act simply because other portions might not be constitutional as applied to hypothetical future cases. At the same time, we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. *Maryland v. Wertz*, 392 U.S. 183, 200, 88 S. Ct. 2017, 2026 (1968)."

C. Burden on Interstate Commerce

Under New Jersey law, as applied in this case, numerous factors had to be weighed before the establishment of a *prima facie* case. Those factors include:

> "(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole;
>
> (2) The safety aspects of the product —the likelihood that it will cause injury, and the probable seriousness of the injury;
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe;
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product;
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. *Dawson v. Chrysler, supra* (Pet. Br. 12a).

Petitioner presented proof of all these items including the aforementioned government studies which pointed out the defect and tested petitioner's alternative design. Contrary to Chrysler's contention, this case was not an analysis of one aspect of this frame's design, nor would New Jersey law permit such an analysis. Proof of the alternative design's ability, overall performance, cost and usefulness was required and presented.

Chrysler's contention that it must now utilize petitioner's alternative design in New Jersey and some other design in some other state is as unsupported by the record as it is absurd.

Common law products liability as applied to automobile design defects effecting crashworthiness of a vehicle is essentially identical throughout the United States. *See Huff v. White Motor Co.*, 565 F. 2d 104 (7th Cir. 1977) and cases cited therein. While the proofs required of a plaintiff are stringent and include an alternative safer design, the jury does not set a standard. The jury merely decides whether the automobile's design was defective. Any number of designs can comply with federal regulations and yet be unsafe. A design with sharp protrusions in the passenger area could comply with the minimum load requirements, yet expose the passenger to a lethal hazard in a "second collision" situation. Federal regulations were not meant to be nor are they all inclusive. Petitioner's alternative design was not demonstrated to violate any federal safety regulations. When a regulation permits a multitude of designs, forcing a manufacturer to pay civil damages for failure to choose a known safe design, it does not interfere with or impose an unreasonable and constitutional objectionable burden on interstate commerce.

Bibb v. Navajo Freight Lines, 359 U.S. 520, 79 S. Ct. 962 (1959) and the remaining cases relied on by Chrysler, tested *affirmative* state regulations which denied a carrier access to a state's highway and/or railways. Because those regulations were inconsistent with other state's regulations and compliance with

one regulation would deny a carrier access to another state, the regulations were declared an undue burden on commerce. There is no such affimative regulation or burden in this case. Chrysler may continue to sell Dodge Monacos in New Jersey and throughout the United States.

Chrysler is asking this Court to declare unconsitutional 15 U.S.C. §1397(c) which calls for continuation of common law liability because that provision might be construed in a manner that would burden commerce. This construction violates the rule that statutes must be construed to avoid constitutional questions. *Ullman v. United States,* 76 S. Ct. 497, 350 U.S. 422 (1956), *reh. denied,* 76 S. Ct. 777, 351 U.S. 928; *Time v. Hill,* 87 S. Ct. 534, 385 U.S. 374 (1967).

> "The Supreme Court has repeatedly warned 'if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' Indeed, the Court has stated that words may be strained 'in the candid service of avoiding a serious constitutional doubt'. Here there is no need to strain words. It requires neither torturing of language nor disregard of a clear legislative policy to avoid the constitutional question advanced by the witness. Indeed, to reach the constitutional issue would require straining of language. In such circumstances the court's duty is plainly to avoid the constitutional question." *Ullman, supra* at S. Ct. 605, U.S. 433.

Applying this rule of construction, the Act must be constitutional as Chrysler is free to sell its cars in any state it chooses. There is, therefore, no undue burden on commerce.

II.

CHRYSLER'S FAILURE TO RAISE THE ISSUE OF COMPLIANCE OR NON-COMPLIANCE WITH THE NATIONAL TRAFFIC AND MOTOR VEHICLE ACT DURING TRIAL PRECLUDES IT FROM RAISING THE ISSUE ON APPEAL.

The majority of Chrysler's arguments are predicated upon an allegation that respondents were able to prove their case without showing compliance with the Act and/or that petitioner's design did not comply with the Act. At trial, however, Chrysler never even questioned compliance. Since respondents' alternative design was a minor modification to existing autos which complied with the Act and since the alternative design outperformed vehicles in compliance, there was no question but that it would have complied.

Both the District Court and the Third Circuit have clearly ruled that Chrysler, by its tactical decision not to raise the issue at trial, has waived it on appeal.

> "Chrysler also argues that there is no evidence that plaintiff's alternative design meets federal standards, and therefore could not be the practical alternate that New Jersey law requires. Plaintiff has pointed to no expert testimony indicating the alternate design would meet federal standards; however, there is nothing in the record to indicate that the alterations proposed would take the car from within the guidelines. Defendant, during trial, failed to cross examine on this issue, nor did it introduce any evidence to demonstrate noncompliance. It is too late for defendant to raise this argument." (Opinion of District Court, 4a).

> "There was no suggestion at trial that the alternative design recommended by the Dawsons would not comply with federal safety standards." (Pet. Br. 16a).

Since Chrysler has been deemed to waive any issues with respect to compliance of the alternative design with federal standards or a duty to provide compliance with said standards, it has waived its right to argue any of the questions it presents to this Court as each is predicated upon a conclusion that proof was lacking on one of these issues, to wit:

> 1. Whether the National Traffic and Motor Vehicle Safety Act, which expressly preempts the state from establishing any safety standard that is not identical to federal motor vehicle safety standards governing the same aspect of vehicle performance, 15 U.S.C. §1392(d), precludes individual juries in product liability actions *from adopting safety standards under state common law that are not identical to applicable federal motor vehicle safety standards?*

> 2. Whether the objectives of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1381, *et seq.*, to improve vehicle safety and establish national uniformity in vehicle safety standards are frustrated when a state permits individual juries to adopt safety standards in common law product liability actions *without requiring proof that such standards will improve overall vehicle crashworthiness and will comply with mandatory federal motor vehicle safety standards*?

> 3. Whether a state common law standard for assessing liability for automotive designs that does not *require petitioners to prove that their proposed alternative designs will improve overall vehicle*

> *crashworthiness and will comply with mandatory federal motor vehicle safety standards* poses an unconstitutional burden on interstate commerce by promoting adoption of inconsistent and conflicting safety standards by individual juries in various states?

Since Chrysler did not raise these issues at trial, they are precluded from arguing them on appeal. *Porter v. American Export Lines,* 387 F. 2d 409 (3rd Cir. 1968); Federal Rules of Civil Procedure, Rule 51.

III.

A VERDICT BASED UPON A STATE'S APPLICATION OF ITS CONTRACT LAW PRESENTS NO QUESTION OF FEDERAL LAW.

This jury's verdict was also based upon Chrysler's breach of its contractual duties to deliver a vehicle fit to be a police pursuit car to Pennsauken Township, a political subdivision of New Jersey and the employer of Officer Dawson. Section 1392(d) of the Act provides:

> "Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

The fact that the Dodge Monaco police pursuit car complied with federal requirements is, therefore, irrelevant to the question of whether this vehicle qualified as a police pursuit car.

There was evidence at trial that Pennsauken ordered two separate classes of cars from Chrysler: unmarked passenger cars and police pursuit cars (15a). Chrysler made specific claims with respect to these police cars which it did not make with respect to the unmarked passenger cars. The township's ordering of these pursuit cars was predicated upon those claims which included claims of rugged construction and high speed capability. Chrysler's chief of design testified that no special design was done for police pursuit cars as opposed to any other vehicles (17a).

Chrysler did not attack the fact that the jury's verdict is based on breach of contract. Since the Act states that a subdivision of a state, such as Pennsauken, may require standards in excess of federal standards, then compliance with the Act is irrelevant and Chrysler does not have legitimate arguments with respect to preemption or interference with interstate commerce.

Pennsauken and Chrysler were free to set any standards in excess of the federal requirements that they choose. The setting of these standards would not hinder commerce since the standards would only apply to the pursuit cars delivered to Pennsauken. They would not apply to passenger cars or to police cars in other townships or states. It was solely a question of what Chrysler and Pennsauken agreed to do by the terms of their contract. The contract had only local effect with no ripples in the stream of commerce.

A state's interpretation of parties' rights under a contract presents no issues of federal law. The contract does not abridge any individual or other constitutional rights. It does not effect any other parties other than the two parties to the contract. The provisions of the contract are not violative of any federal regulations or purpose since the Act provides that this class of parties may agree to terms in excess of the federal requirements.

Chrysler has not listed any reasons for overturning this private contract in its writ nor could it as it would be barred by its prior failure to raise any question of the constitutionality of this private contract.

Since this verdict can be sustained upon the non-constitutional question of the application of New Jersey's contract law, the alleged constitutional issues would not be decided.

> "We need not consider respondent's contention that only the jurisdictional question was presented by the petition for certiorari, for in reversing on the above ground we follow the traditional practice of this Court on refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties. See Peters v. Hobby, 349 U.S. 331, 338, 75 S. Ct. 790, 793; Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 132, 136, 153, 67 S. Ct. 231, 232, 233, 236, 91 L. Ed. 128." *Neese v. Southern Railway,* 350 U.S. 77, 78, 78 S. Ct. 131, 132 (1955).

CONCLUSION

Justice Frankfurter commented in *Maryland v. Baltimore,* 338 U.S. 912, 917, 918 (1950) upon the reasons that a petition for certiorari is denied. They include:

> "Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a

> matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wish adjudication has its own time for ripening."

In the case at bar, the record does not support petitioner's claims. The federal statute which allegedly preempts provides for continuation of common law and the verdict can be supported by state law. There is no compelling reason to grant certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY AT CAMDEN, NEW JERSEY

DOCKET NO. 76-1651

RICHARD F. DAWSON and DIANA DAWSON,

Plaintiffs,

vs.

CHRYSLER CORPORATION, TOWNSHIP OF PENNSAUKEN, DELTA LEASING COMPANY and CHERRY HILL DODGE, INC., CUMBERLAND MUTUAL FIRE COMPANY & PEERLESS INSURANCE COMPANY,

Defendants.

TRANSCRIPT of the above captioned matter was taken before the Honorable Stanley S. Brotman, Judge, United States District Court, District of New Jersey, Camden, New Jersey, January 25, 1979.

* * * *

APPEARANCES:

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EDWARD R. MURPHY,
ESQUIRE

Appendix A

BY: FRANCIS MARSHALL, ESQUIRE
For defendants Delta Leasing & Cherry Hill Dodge

MESSRS. BLEAKLY, STOCKWELL & ZINK,
FREDERICK FITCHETT, ESQUIRE
BY: HARRY SHORT, ESQUIRE,
For Defendant, Chrysler Corporation

THE COURT: On October 20, 1978, a jury rendered a verdict for plaintiffs in this action, Dawson versus Chrysler Corporation civil number 76-1651. Now defendant Chrysler Corporation moves for a judgment notwithstanding the verdict, Federal Rules of Civil Procedure 50 (b), and in the alternative for a new trial, Federal Rules of Civil Procedure 59 (a). Defendant has supported its motions by two briefs and oral argument, asserting numerous grounds for relief from judgment.

The Court will consider the judgment n.o.v. motion first. Chrsyler's primary argument on behalf of this motion is that this Court must hold, as a matter of law, that Chrysler had no duty to design a safer automobile in this circumstance. In my October 16, 1978, opinion on Chrysler's directed verdict motion, I stated that *Huddell versus Levin*, 537 F. 2d 726 (3rd Circuit 1976) and *Cepeda versus Cumberland Engineering Co., Inc.*, 76 N.J. 152 (1978) indicated that only the question of a general duty was for the court, and furthermore, that the law was that an automobile manufacturer had a general duty to manufacture a reasonably crashworthy vehicle. The jury then determines what specific duty was owed in the particular case, that is, whether the manufacturer failed in a particular way to provide a reasonably crashworthy vehicle, and whether that failure caused the injury. See Transcript XIV at page 14.

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Chrysler provides several "factors" which it urges this Court to consider in assessing its duty to plaintiffs. The Court finds that none of these factors changes its holding explained at length in the directed verdict opinion, that plaintiffs were owed a general duty to be sold a crashworthy vehicle, and that plaintiffs had produced a prima facie case for the jury that Chrysler breached its particular duty in this instance.

Chrysler first contends that the complexity of the defect charged prevents the jury from considering defendant's duty to provide a better design. The Court can certainly not accept this proposition, as it would effectively overrule *Huddell* and *Cepeda* for certain types of accidents. While the complexity of the defect involved may require more intricate and elaborate proofs from a plaintiff, it cannot eliminate his ability to recover entirely. Chrysler argues that "the prosecution of a lawsuit is a poor way to design a motor vehicle." It certainly is, given that such lawsuits normally arise only after a defective vehicle has caused injury or death. But the law is concerned with compensating these victims, as well as with deterrence to manufacturers. And for the latter goal, the Court's role under New Jersey law is only to provide adequate instructions to the jury on applying the *Cepeda* risk/utility factors, and the jury makes the final decision.

Defendant next contends that the Court should consider the fact that Chrysler has met the standards set by the National Highway and Traffic Safety Administration. However, there are no standards specifically covering a frame and body's ability to withstand side impacts. Furthermore, the federal statute authorizing standards itself says that "compliance . . . does not exempt any person from any liability under common law." 15 U.S.C. Section 1397(c).

Chrysler also argues that there is no evidence that plaintiff's alternative design meets federal standards, and therefore could not be the practical alternate that New Jersey law requires. Plaintiff has pointed to no expert testimony indicating the alternate design would meet federal standards; however, there is nothing in the record to indicate that the alterations proposed would take the car from within the guidelines. Defendant, during trial, failed to cross examine on this issue, nor did it introduce any evidence to demonstrate noncompliance. It is too late for defendant to raise this argument. The Court finds nothing in *Cepeda* to indicate that plaintiff's burden of production extends to this issue even where a defendant does not raise it during trial.

Next Chrysler contends that the Court should consider the safety features of other automobiles in determining Chrysler's duty. But the Court does not see this as within its review of Chrysler's general duty. Rather, the level of performance of the industry is to be considered by the jury, and evidence on that issue was presented by the plaintiffs, as well as the defendant. And it has been the law since the landmark *T.J. Hooper* case, 60 F. 2d 737 (2nd Circuit 1932). An opinion authored by Judge Leonard Hand, not Judge Friendly that the state of the art is only evidence of negligence, not an absolute defense. See also *McComish versus DeSoi,* 42 N.J. 274, 282 (1964).

Finally, Chrysler contends that the accident at issue here was bizarre. While the Court agrees that the defendant's general duty does not extend to bizarre accidents, the Court finds that this accident was not in that category. There is proof that various organizations ran tests on accidents similar to this collision. The speed was not bizarre, but only a relatively slow 30 miles per hour. The object impacted, a fixed pole, is common along highways, and the angle and attitude of the car at the time

of impact does not seem unusual. This accident is well within the realm of foreseeable collisions for which defendant is charged with a duty to provide reasonable protection.

For the reasons expressed, the Court holds that Chrysler did have a general duty to plaintiff, and that the case could be sent to the jury.

Chrysler makes several other attacks at plaintiff's case to justify a reversal. It first argues that plaintiffs simply failed to make a prima facie showing of a defect. In support of this, Chrysler contends again that this matter is simply too complex to go to a jury. I have already answered this argument. Chrysler also charges that plaintiffs did not adequately show in several respects how their alternate design would function. The Court stands on its position stated in its directed verdict opinion, Transcript at 25-30, that plaintiffs produced a prima facie case of alternate design. As was stated in that opinion, the Court refuses to interpret *Cepeda* as creating so many proof requirements intechnical areas as to make it seriously impractical or prohibitively expensive for a plaintiff to win a case. Transcript at 13.

Chrysler next argues that it should not be liable because it followed certain design specifications provided by the Township. Chrysler cites *Sanner versus Ford Motor Co.*, 144 N.J. Super. 1 (1976). But in *Sanner*, the specifications specifically requested that no roll bar or seat belts be provided, and the lack of that equipment specifically caused the accident. Here, the specifications did not reach the frame and structure of the car, instead the Township relied on Chrysler's legal duty to include a reasonably safe structure. *Sanner* is inapplicable.

Chrysler also charges that plaintiffs' expert testimony was inconsistent on certain causation issues. The Court stands on its

directed verdict opinion, Transcript at 16-19, to answer these renewed arguments. The same can be said concerning Chrysler's argument concerning the fact that the injury likely took place after the peak in deceleration forces; see Transcript at 19-20. Furthermore, the Court does not find that plaintiff introduced a fourth theory of liability in its summation.

Chrysler argues that plaintiff produced no evidence concerning the effect of the tubular structure. This is not so. Transcript X at 10; Transcript XI at 58. The plaintiffs also produced sufficient testimony of enhanced injuries, and defendant's objection there is not well taken. Lastly, Chrysler complains that plaintiffs failed to produce evidence that the vehicle was not substantially changed. I addressed this point, too, in the directed verdict motion opinion. Transcript at 21-25. And the jury was properly instructed on substantial change and causation in relation to the divider and the seat belt. Transcript, of Charge at 29-31.

The motion for a judgment notwithstanding the verdict must be denied.

Turning to the new trial motion, the Court will first enunciate the standard of review to be applied to those allegations of error supporting the motion. See 11 *C. Wright & A. Miller,* Federal Practice and Procedure Section 2805 at 38-41:

> "Any error of law, if prejudicial, is a good ground for a new trial.
>
> "A principle that strikes very deep is that a new trial will not be granted on grounds not called to the Court's attention during the trial unless the error was so fundamental that gross

injustice would result. This principle has particular application to claims of error in instructions that were not objected to since it is stated in so many words in Rule 51 but the principle also has been applied to a variety of other kinds of claimed errors . . .

"The importance of Rule 61 in its application to motions for a new trial cannot be overlooked. It provides specifically that no error 'is ground for granting a new trial or for setting aside a verdict * * * unless refusal to take such action appears to the Court inconsistent with substantial justice.' It further admonishes the Courts to 'disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.' Thus it is only those errors that have caused substantial harm to the losing party that justify a new trial. Those errors that are not prejudicial do not call for relief under Rule 59."

Chrysler's first charge of error is that the Court erroneously allocated peremptory strikes to the jury members. Under 28 U.S.C. Section 1870, the Judge may allow more than three challenges, and require challenges to be exercised jointly where there are multiple plaintiffs or defendants. See *Blount versus Plovidba*, 567 F. 2d 583, 585 (3rd Circuit 1977). Thus in *Moore versus South African Marine Corp., Ltd.*, 469 F. 2d 280 (5th Circuit 1972), the Appellate Court found no error where the trial court gave the defendant and third-party defendant the same number of challenges, when combined, as the plaintiff. The Court said it was within the trial Court's discretion. Identified at

281. *Accord, Standard Industries, Inc. versus Mobil Oil Corp.*, 475 F. 2d 220, 225 (10th Circuit 1973); 9 Federal Practice and Procedures, *supra,* Section 2483 at 474.

Defendant contends that the Court's allocation was essentially an abuse of its discretion because "the interests of the third-party defendants and the defendant were adverse to each other." Obviously, parties on either side of a third-party complaint have adverse interests to a certain extent. But here the Court found, in its discretion, that the primary conflict was between the plaintiff, who intended to show that he was injured because of a breach of duty by one of the defendants rendering the automobile defective and the defendants, who had to show the opposite.

It should also be noted that Chrysler failed to object to the allocation of peremptory strikes at the time. This forecloses an objection at this time. *Giffin versus Ensign,* 234 F. 2d 307, 316 (3rd Circuit 1956); 11 Federal Practice and Procedures *supra,* Section 2805 at 39. This is not a case of gross injustice where an exception to this rule might apply.

The next alleged error is that the Court improperly restricted the defendant from cross-examining plaintiffs' witnesses on the cause of the collision itself. This was indeed proper because plaintiffs introduced no evidence linking Chrysler to the occurrence of the collision itself, and eventually granted a directed verdict on all charges relating to the "first collision." Transcript XIV at 4-6. Additionally, the jury was charged that "plaintiffs do not contend that defendant Chrysler, in any way, is responsible for the Dawson operated vehicle going out of control and leaving the highway. . . ." See Transcript at 13.

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As the cause of the "first collision" was not at issue, such cross-examination has no substantive relevance. There is no showing that the Interrogatories defendant sought to introduce contradicted or would contradict plaintiff's testimony so that they would be relevant for impeachment purposes. In fact, there is nothing to show that plaintiff's testimony could be reasonably challenged on credibility grounds. On the other hand, cross-examination on the cause of the "first collision," an issue irrelevant to this case, would be prejudicial and misleading, and was properly excluded under Federal Rules of Evidence 403. This was the basis of my ruling at the time. See Transcript II at 112.

Chrysler next object that plaintiffs' three experts were allowed to testify outside the scope of their expert opinions, and that defendant was unfairly prejudiced thereby. The Court finds that there was no significant surprise or incurable prejudice resulting from any discrepancy from the short expert reports since the testimony introduced no substantially different theory or covered any subject matter not reasonably within the expert's field and qualifications. The Court also finds no bad faith by plaintiffs in introducing expert testimony. Concerning the testimony of Dr. Albert Burstein, see Transcript XII at 141-42; Transcript XIV at 21. Thus exclusion of evidence was not justified for any expert under the standards set in *DeMarines versus KLM Royal Dutch Airlines*, 580 F. 2d 1193, 1201-02 (3rd Circuit 1978) and cases cited therein. Defendant has cited no cases supporting its position.

Defendant also object that expert Byrol Bloch was unqualified. The Court ruled on his qualifications, see Transcript VII at 3-14, and kept his testimony within the boundaries set by that ruling.

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Chrysler contends error was committed by allowing testimony on the alleged rupture of the gas tank of the Dawson vehicle. See Transcript VII at 51. But there was no testimony that the alleged rupture had anything to do with the plaintiff's injuries, so no unfair prejudice could have arisen.

Defendant next argues that plaintiffs were erroneously allowed to change the theory of their case by alleging a Section 402B violation. The Court stands by its opinion already rendered on this objection. See Transcript I at 49-55. Furthermore, the Section 402B claim was later dismissed from the case, see Transcript XIV at 10. Defendant also contends that the Court sua sponte enlarged plaintiffs' theory of recovery by including liability for the second collision. But the Complaint can readily be construed to mean liability for the first and second collision within the term "accident." This determination was, in fact, made in response to defendants' motion for directed verdict, not sua sponte by the Court. See Transcript XIV at 5-6.

Chrysler charges error in the Court's allowing the jury to take exhibit P-107 into the jury room. This did indeed violate Federal Rules of Evidence 803 (18). However, the Court finds that the presence in the jury room of a simple chart, which had been the subject of testimony on a tiny aspect of the defect issue, to be clearly harmless error not inconsistent with substantial justice. This it does not justify a new trial. Federal Rules of Civil Procedure 61. The error is not compounded by plaintiffs' counsel referring to the chart during summation because he would have been allowed to include such statements in his closing anyway.

Defendant also argues that plaintiff should not have been allowed to cross-examine defense witnesses on reports P-110 and P-111 because they were not established as reliable authority by

those defense witnesses. Rule 830 (18). However, they were established by reliable authority to the satisfaction of the Court, Rule 104 (a), when they were first used by the defendant in its cross-examination of plaintiffs' witness, Dr. Steven Batterman. See Transcript X at 121-23. Defendant's used the Calspan report to cross-examine Dr. Batterman, and there was no objection by plaintiffs as to its use. Such use indicated to the Court agreement that the report was authoriatative, and the Court accepted this conclusion. It also applied this conclusion of authority to the first volume of the same report absent any specific denial of same by defense counsel or witnesses.

Even if erroneously admitted, the reports were such a small part of the expert testimony as to be harmless error within Rule 61.

Defendant next makes several objections to the jury charge. First, it objects to the breach of implied warranty charge, contending that 12 of plaintiffs' complaint referred only to the first collision. But as I stated a moment ago, the term "accident" reasonably pertains to injuries from the first and second collisions.

Chrysler states the Court should have charged the jury that compliance with federal safety standards is not conclusive evidence that the vehicle was not defective. I did charge that conformity with standards is not conclusive evidence "as to whether or not Chrysler Corporation designed and sold a product in a defective condition. . . ." See Transcript at 24-25. Accordingly, the suggested charge was indeed given. Chrysler also contends that the Court should have told the jury that an alternate design should have complied with federal standards. This is proper jury argument, but there is no law compelling its

inclusion in the charge. Furthermore, defendant did not timely state an objection on this ground. Federal Rules of Civil Procedure 51.

Chrysler argues that the seat belt instruction was improper as the Court should have emphasized that the belt is one of the design characteristics of the car to be considered under the *Cepeda* analysis. But the charge did refer to *all* safety features. See Transcript at 28. And the special instruction concerning failure to use the seat belt as a voluntary and unreasonable encounter of a known risk, Transcript at 30, and defendant's burden of proof thereto, is pursuant to language in *Cepeda* affirming use of that doctrine as a defense in design defect cases. 76 N.J. at 182-92. See also Transcript XIV at 23-24. Furthermore, defendant did not state a timely objection to the part of the charge placing the burden of proof on defendant on the unreasonable encountering issue. Transcript at 51. Chrysler also claims that the Court should have charged the jury that inflation would drive up both costs and interest rates on money invested. But the Court did so charge the jury. See Transcript at 37-38.

Chrysler finds error in the Court giving the factor 29.52 to the jury. But this was properly based on an example given by plaintiffs' actuary, Transcript XI at 170, and the Court explicitly stated that the jury could accept or reject the figure. Transcript at 38. Of course, the actuary did testify that interest rates as well as costs would be pushed up by inflation. Transcript XI at 165, and the jury charge reflected this possibility, see Transcript at 37-38. But there was no error, as Chrysler alleged, in not telling the jury that the factors must cancel out. That would be incorrect. Instead, the Court properly instructed the jury concerning both possibilities, and added that the jury must makes its own decision.

Finally, there was no error in not explicitly instructing the jury that Mrs. Dawson could not recover for pain and suffering. There is no authority saying that the Court must delineate what cannot be recovered here. The Court proceeded properly in limiting its remarks to a delineation of what Mrs. Dawson could properly recover. See Transcript at 42-43. There was no error in the jury charge.

Chrysler alleges that use of the charts by plaintiffs during their summation was improper under New Jersey law. However, *Tenore versus Nu Car Carriers*, 67 N.J. 466, 482-82 (1975) only prevents counsel and the Court from giving the jury gross figures. It does not prevent a chart showing the number of years of life expectancy and undisputed annual figures for medical costs and lost wages. *Botta versus Brunner*, 26 N.J. 82 (1957) is inapplicable because it applies only to paid and suffering. No figures for that element of damages were given on the charts. The jury was instructed that it must weigh the evidence and decide in its judgment whether to accept or reject any figures provided. See Transcript at 36-38. There was no error.

Defendant objects to the award of pre-judgment interest. Defendant's brief states nothing that was not raised in its prior brief on this issue. Accordingly, the Court stands on its earlier opinion, issued from the bench on November 17, 1978.

Chrysler's final point is that the verdict was against the weight of the evidence. The Court is well aware it must "not sit to approve miscarriages of justice" by ignoring an improper verdict. 11 Federal Practice and Procedures, *supra* Section 2806 at 49. And the Court is also mindful that it must carefully scrutinize a verdict where "a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors. . . ." *Lind versus Schenley Industries, Inc.*, 278 F. 2d 79, 90 (3rd Circuit), cert. denied, 364 U.S. 835 (1960).

Yet the Court must also remember that "the trial judge is negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the Judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts." *Lind,* 278 F. 2d at 90. "(A) decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the Judge should accept the findings of the jury, regardless of its own doubts in the matter." 11 Federal Practice and Procedures, *supra,* Section 2806 at 49. Furthermore, "The New Jersey cases manifest a policy liberally favoring jury resolution of defectiveness issues, as well as causation issues, in products liability cases. *Huddell,* 537 F. 2d at 736.

Plaintiffs produced qualified experts providing convincing opinion that Chrysler's design was unreasonable and defective for this type of vehicle. Proofs were lengthy and elaborate. The verdict does not defy the Court's common sense. While a verdict for defendant might also have withstood a new trial motion, the Court cannot find that a verdict for plaintiffs was so against the weight of all the evidence as to warrant the Court taking the decision away from the jury. The motion for a new trial is denied.

The appropriate order will be entered.

APPENDIX B — PURCHASE SPECIFICATIONS

PENNSAUKEN, NEW JERSEY

PURCHASE
DETAILED SPECIFICATIONS

1. *GENERAL:* It is the intent of this specification to describe and govern the purchase by the Township of Pennsauken, New Jersey, hereinafter termed the Buyer, nine (9) police cruiser vehicles and six (6) unmarked conventional cars in accordance with the terms and conditions in this specification.

   The vehicles shall be unused 1974 models and shall be delivered to the Buyer by the successful bidder, hereinafter termed the Seller, within fifteen (15) days after the contract is signed. Delivery of four (4) police cruiser Vehicles is required no later than January 15, 1974. Delivery of remaining cars is required by January 31, 1974.

   The Seller shall provide a one year maintenance contract to cover the maintenance set forth in this specification payable in twelve equal installments, and this maintenance service must be provided within ten (10) miles of the Township of Pennsauken.

2. *BID DEPOSIT:* All bids must be accompanied by a certified check in the amount of at least ten percent (10%) of the total bid, but in no case in excess of $10,000.00 which shall be forfeited if the successful bidder fails to enter into a contract with the Township of Pennsauken after notice of acceptance of his proposal.

Appendix B

PERFORMANCE BOND: All bidders must submit with their bid a statement from their Surety Company showing that they have a binding commitment, and will if awarded a contract, issue to the Township of Pennsauken at the time the contract is executed, a Performance Bond in the amount of 100% of the total contract price.

3. *EXCEPTIONS TO SPECIFICATIONS:* Any exceptions to this specification must be explained fully in a bid letter.

APPENDIX C — TRIAL TESTIMONY OF HERMAN SMITH

Answer: Well, you know, this is a little hard to put, but a taxi cab is a taxi cab. We don't do any special design for a taxi cab. We don't do any special design for a police car. If these things happened, they happened by osmosis or something, and if it is a minor little thing like splitting a molded headliner, that doesn't mean anything to us, it is an easy thing to accomplish, just split the headliner and put the molding over it. It would never come to my attention. Taxi cabs always want a mirror through the windshield piller. I am familiar with that because we have to test after the hole is through the windshield piller to be sure that the car is structurally sound. If reinforcement is required we put it in there. If it takes additional welding then that is put in there. But here is no big input into the production design room on police cars.

MR. THISTLE: Okay, thank you.

- - -

(At which time the court reporter completed reading the deposition.)

APPENDIX D — EXHIBIT P-110, TECHNICAL REPORT

TECHNICAL REPORT

BASIC RESEARCH IN AUTOMOBILE CRASHWORTHINESS— TESTING AND EVALUATION OF MODIFICATIONS FOR SIDE IMPACTS

By: Richard P. Mayor and Kenneth N. Naab

CAL No. YB-2684-V-3

Prepared For:

Department of Transportation
Federal Highway Administration
National Highway Safety Bureau
Washington, D.C. 20591

INTERIM TECHNICAL REPORT

Contract No. FH-11-6918
November 1969

CORNELL AERONAUTICAL LABORATORY, INC.
OF CORNELL UNIVERSITY, BUFFALO, N.Y. 14221

Appendix D

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INTERIM TECHNICAL REPORT
BASIC RESEARCH IN AUTOMOBILE CRASHWORTHINESS—
TESTING AND EVALUATION OF MODIFICATIONS FOR SIDE IMPACTS

By
RICHARD P. MAYOR
KENNETH N. NAAB
OF THE
TRANSPORTATION RESEARCH DEPARTMENT

CAL REPORT NO. YB-2684-V-3
CONTRACT NO. FH-11-6918

NOVEMBER 1969

Prepared for:

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
NATIONAL HIGHWAY SAFETY BUREAU
WASHINGTON D.C. 20591

Appendix D

FOREWARD

This report presents the results of the side impact studies as developed under the Basic Research in Crashworthiness Program. The objective of the overall program is to develop and test automobile structural configurations that will (1) reduce intrusions into the occupant compartment, (2) produce more nearly uniform crush characteristics, and (3) satisfy the strength and stiffness requirements of normal operating conditions. The results of the research will be used to explore the feasibility of an automobile crashworthiness standard to reduce penetration of the passenger compartment by outside objects and, at the same time, more efficiently utilize energy absorption principles.

The overall objectives are to be accomplished by making modifications on recent production automobiles. Three other concepts have been developed within the program. These are a forward structure modification, an engine deflection concept and a rear engine vehicle simulation.

The findings of the overall program are presented in the following series of reports:

"Basic Research in Automobile Crashworthiness — Testing and Evaluation of Forward Structure Modification Concept", CAL Report No. YB-2684-V-1;

"Basic Research in Automobile Crashworthiness — Testing and Evaluation of Engine Deflection Concept", CAL Report No. YB-2684-V-2;

"Basic Research in Automobile Crashworthiness — Testing and Evaluation of Modifications for Side Impacts", CAL Report No. YB-2684-V-3;

Appendix D

"Basic Research in Automobile Crashworthiness — Testing and Evaluation of Rear Engine Concept", CAL Report No. YB-2684-V-4;

"Basic Research in Automobile Crashworthiness — Analytical Studies", CAL Report No. YB-2684-V-5;

"Basic Research in Automobile Crashworthiness — Summary Report", CAL Report No. YB-2684-V-6.

The reported research was performed under Contract No. FH-11-6918 with the National Highway Safety Bureau, Federal Highway Administration, U.S. Department of Transportation. The opinions, findings and conclusions expressed in this report are those of the authors and not necessarily those of the National Highway Safety Bureau.

This report has been reviewed and is approved by:

s/ Edwin A. Kidd
Edwin A. Kidd, Head
Transportation Research
Department

Appendix D

SUMMARY

The side structures of several frame-type automobiles were modified with the objective of achieving constant deceleration without excessive passenger compartment intrusion. A review of actual accident cases showed evidence of a lack of adequate door strength relative to the support posts; hence, the initial vehicle modification consisted of a strengthened door and related structure. Two other modified vehicles were tested which involved changes to the vehicle frame. Additional tests included an unmodified (base line) vehicle for comparison, a developmental vehicle for investigating the performance of a minor modification and to improve methods of data collection and interpretation, and a number of dynamic door and beam component tests.

All test vehicles were 1966 Fords impacted at a nominal velocity of 20 MPH into the CAL pole barrier — a concrete filled, 12¾ O.D. pipe. The impact points were near the center line of the right front door.

Results of the tests showed the excessive compartment intrusion of present designs and demonstrated that improvement is possible with a moderate weight increase and without significantly higher peak decelerations. Additional side modifications are recommended which fully integrate the door reinforcing and frame modification concepts that were investigated in this study.

Appendices describe: (1) tests on a latch mechanism to permit strengthening of the door without interfering with its functional operations, and (2) a comparative study of the effects of accelerometer location and filtering.

Appendix D

1. *INTRODUCTION*

The objective of modifying the side structure of a vehicle has been to obtain a uniform deceleration response in a collision without unacceptable intrusion into the passenger compartment. Permanent deformation, since all test vehicles were impacted against a rigid obstacle, is not undesirable per se, but the effectiveness of any modification requires that the deformation that does occur be used as efficiently as possible to limit the peak compartment deceleration. Passenger compartment intrusion is inherently bad since it can contribute to injuries in side collisions.

The underlying purpose of this research has been to explore the feasibility of reducing injuries and fatalities in lateral collisions. The relationship between those quantities such as deceleration, crush, etc., which can be directly measured during a crash test and the corresponding injury potential of the collision is tenuous and complex. Seating position, restraint devices and human tolerance data are all important variables. Such considerations, however, are not within the scope of this present study which primarily deals with vehicle structure. Some of these aspects of the overall problem were explored in a simplified computer study of car-to-car side collision, Reference 1.

Some differences between modifications to improve behavior in side collisions and those for frontal impacts should be noted. Passenger compartment intrusion is much more of a problems in side collisions; only a small space is available to protect the occupant on the impact side from the impacted object, and intrusion occurs in all but very low speed collisions. The limited space and the intrinsic weakness of conventional side structures of vehicles severely limit the modifications that can be considered.

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This report presents the test results of two vehicle modifications for improved performance in lateral impacts — one involving changes to the door and related structure using light gauge sheet metal and the second involving changes to the frame using structural I-beams and tubes. Also presented are results of a base line (unmodified) impact and a developmental crash test, the conclusions drawn from comparing the base line and modified vehicle tests, and results of component tests on doors.

2. *CONCLUSIONS AND RECOMMENDATIONS*

2.1 *Conclusions*

2.1.1 Present automotive design practice permits excessive passenger compartment intrusion in side impacts with narrow, fixed objects at low impact velocity. For a 20 MPH side collision into a fixed pole, permanent external penetration for a conventional (base line) vehicle was 24 inches. The roof, door, and floor structures offer inadequate resistance to side intrusions.

2.1.2 Discernable improvement in structural crashworthiness over a base line (unmodified) vehicle has been demonstrated with vehicle concepts involving modifications for side impact protection. Specifically, these design concepts were (1) a modified side structure incorporating door beams and (2) a more extensive modification including structural changes to both the vehicle frame and passenger compartment. Full-scale crash tests were performed which simulated a side collision into a fixed pole at 20 MPH.

2.1.3 For a moderate weight increase (approximately 20 pounds per door), intrusion resistance can be improved in side impacts at a door opening without causing significantly higher

peak acceleration. This conclusion is based on the performance of the "Mod. 3" vehicle, which included door beams and a number of relatively minor design changes to the passenger compartment structure. Such an approach can improve performance somewhat by increasing lateral loads early in the collision. However, marked improvement in occupant protection in side impacts with fixed objects will require more extensive structural modification of present automobiles, including more substantial frame structures.

2.1.4 A structural concept combining modifications to the vehicle frame and passenger compartment showed significant improvement over the performance of the base line (unmodified) vehicle. This conclusion is based on the performance of the "Mod. 3A(2)" vehicle, for which deformation of the side structure was substantially reduced in a nominal 20 MPH pole collision and the acceleration waveform was more uniform and closer to a 20 g mean value. Additional crashworthiness improvement is believed to be possible through further frame modification and a more complete integration of passenger compartment modification with existing vehicle structure.

2.1.5 Because of the limited acceptable crush distance available in side impacts, it is essential that substantial loads be developed as early as possible. This can be accomplished by the addition of structural members at the periphery of a vehicle, or by methods of transferring impact load to frame members. However, an effective structural design must also limit collapse loads to avoid unacceptably high accelerations which might cancel out any structural improvement in crashworthiness due to reduced intrusion. A uniform compartment acceleration response in the neighborhood of 20 g's appears to be a reasonable design goal for side impact performance.

Appendix D

2.2 *Recommendations*

2.2.1 Additional side structure modifications, aimed at more fully achieving the goals of this research, should be developed and tested. A combination of the passenger compartment and frame modifications already tested is suggested as a first step. Further modifications should more fully integrate added structural components with existing vehicle structure in order to demonstrate design practicability and limit weight increase.

2.2.2 Evaluation of side structure modifications in car-to-car impacts is recommended. In the present research program, side impact tests have been exclusively performed against a narrow, fixed object (stationary pole). This is believed to constitute a most stringent impact condition as well as being quite representative of real-world single vehicle accident exposure. However, the implications of car-to-car side impact performance between conventional and modified vehicles should also be explored. This should include evaluating the effect of modifying the front structure of an impacting vehicle on the performance of conventional and modified side structure.

2.2.3 Side impact tests of structurally modified vehicles at an impact speed greater than 20 MPH are recommended. Test results indicate that higher speed tests would more dramatically demonstrate improvement in structural performance of modified vehicles in side impacts with fixed objects when compared with unmodified vehicle performance.

2.2.4 Rollover testing of vehicles with modified side structures is recommended. Results of the present program indicate that a roll bar structure designed to transfer load to the opposite side and to dissipate energy through controlled collapse

is an attractive component for improving side impact structural performance. A roll-bar structure, as well as other side structure modifications, can likely be beneficial for improving crashworthiness in both side impact and rollover-type accidents. This dual-feature potential of side structure designs should be explored further.

2.2.5 The development and testing of a vehicle frame structure for providing effective collapse in both frontal and side impacts is recommended. It is believed that frame cross members which can be effectively utilized for transferring load and dissipating energy in side collisions could be integrated with a front structure designed to control collapse in frontal impacts.

APPENDIX E — EXHIBIT P-111, TECHNICAL REPORT

Report No. YB-2987-V-14

BASIC RESEARCH IN CRASHWORTHINESS II — DEVELOPMENT AND TESTING OF VEHICLE SIDE STRUCTURE MODIFICATIONS

James E. Greene

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MAY 1973

Interim Technical Report
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Prepared For:

U.S. DEPARTMENT OF TRANSPORTATION
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
WASHINGTON, D.C. 20590

Appendix E

TECHNICAL REPORT STANDARD TITLE PAGE

Title and Subtitle Basic Research in Crashworthiness II — Development and Testing of Vehicle Side Structure Modifications	Report Date May 1973
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Performing Organization Name and Address CALSPAN CORPORATION P.O. Box 235 Buffalo, New York 14221 (716) 632-7500 (formerly Cornell Aeronautical Laboratory, Inc.)	Work Unit No. N46 Series Contract or Grant No. FH-11-7622
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Abstract

Structural modifications were developed for full-size, frame chassis automobile to improve occupant protection in side collision accidents. These modifications involved redesign of the side pillars, doors, roof and frame structure to increase intrusion resistance of the occupant compartment, and to more effectively dissipate crash energy. The side structure designs are compatible with front structure modifications also developed by Calspan in a parallel effort, resulting in a unified front/side structural concept. Weight increases associated with the side structure modification were on the order of 250 to 275 lbs. of which about 150 lbs. of the structure is also related to the frontal collision mode. Vehicles incorporating side structure modifications were subjected to extensive crash testing, which included perpendicular and oblique vehicle-to-vehicle side collisions at speeds up to 45 MPH, and lateral impacts against a narrow fixed object at 21 MPH. Side impacts by both conventional and

modified front structure striking vehicles were performed. Relative to conventional vehicle (base line) performance, the modified side structures demonstrated significantly enhanced crashworthiness under all of the investigated side impact conditions.

Key Words
crashworthiness
side structure design
modified vehicles
impact testing

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FOREWORD

This interim technical report describes the development of side structure modifications related to full-size, frame chassis automobiles. In addition, results of a series of crash tests encompassing a broad range of side impact conditions are presented that enabled an evaluation of the effectiveness of the structural modifications.

This report is submitted in partial fulfillment of a program of research conducted by Calspan Corporation for the National Highway Traffic Safety Administration under Contract No. FH-11-7622. Contract Technical Manager for this project is Mr. Glen Brammeier of NHTSA.

The opinions and findings expressed in this publication are those of the author and not necessarily those of the National Highway Traffic Safety Administration.

This report has been reviewed and is approved by:

s/ Edwin A. Kidd
Edwin A. Kidd, Head
Transportation Research
Department

Appendix E

SUMMARY

Structural modifications were developed for full-size, frame chassis automobiles to improve occupant protection in side collision accidents. These modifications involved redesign of the side pillars, doors, roof and frame structure to increase intrusion resistance of the occupant compartment, and to more effectively dissipate crash energy. The side structure designs are compatible with front structure modifications also developed by Calspan in a parallel effort, resulting in a unified front/side structural concept. Weight increases associated with the side structure modification were on the order of 250 to 275 lbs. of which about 150 lbs. of the structure is also related to the frontal collision mode. Vehicles incorporating side structure modifications were subjected to extensive crash testing, which included perpendicular and oblique vehicle-to-vehicle side collisions at speeds up to 45 MPH, and lateral impacts against a narrow fixed object at 21 MPH. Side impacts by both conventional and modified front structure striking vehicles were performed. Relative to conventional vehicle (base line) performance, the modified side structures demonstrated significantly enhanced crashworthiness under all of the investigated side impact conditions.

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1. *INTRODUCTION*

This report contains the results of research directed towards development of structural modifications to improve the crashworthiness of automobiles involved in side collision accidents. The need for more protective side structures was demonstrated in a directly related project effort (reported in Reference 1), in which side impact tests of conventional (unmodified) automobiles were performed. From these "base line" tests, as well as from statistical accident data, it became abundantly clear that today's automobile generally does not offer adequate occupant protection in collisions where the principal impact loads are imposed on the side of the occupant compartment.

Strengthening vehicle side structures, in addition to providing more effective occupant protection, can be a particularly attractive design feature since these structures do not have the potential for increasing collision "aggressiveness" with respect to occupants of other involved vehicles, or to struck pedestrians, as may be the case for modified front structures. Furthermore, enhancing side impact crashworthiness might be a natural first step in the evolution of more crashworthy automobile structures, in anticipation of front structure modifications introduced in the future that could further aggravate the side collision vulnerability problem. It should also be noted that improved side structures could also benefit occupants in rollover accidents.

Based on the established needs for more effective side impact protection, structural modifications were developed for a full-size, 4-door sedan vehicle that involved redesign of specific body and frame components and sub-assemblies related to the apparent side impact vulnerability problem. The major

objectives were (1) to provide the necessary structural integrity to insure containment of occupants within a protective "survival space", and to minimize intrusion of that space (the occupant compartment) from excessive lateral collapse or catastrophic failure of the side structure, (2) to maintain the lateral acceleration environment of the occupant compartment well within limits of human tolerance, and (3) to preserve as much as possible the traditional characteristics of automobile side structures including operational and dimensional requirements, materials and fabrication methods, structural weight, and design aesthetics.

To evaluate the effectiveness of the structural modifications in improving crashworthiness, modified vehicles were subjected to a series of side impact tests. These crash tests encompassed a broad range of moderate to very severe side impact conditions, including perpendicular and oblique collisions by both conventional and modified* front structure striking vehicles at speeds up to about 45 MPH, and collision with a narrow fixed object at a lateral speed exceeding 20 MPH. The test conditions for the modified struck vehicles were equivalent to corresponding base line tests so that direct comparisons between the structural performance of conventional and modified side structures were possible.

General conclusions and recommendations based on the results of the investigation are contained in Section 2. Section 3 presents a discussion of the side structure design concepts, followed by a description of the test methodology in Section 4. Specific details of the structural modifications and associated test data are given in Section 5. Section 6 presents a general

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* Implications of a modified front structure vehicle striking the side of a *conventional* automobile are discussed in Reference 2.

discussion of the overall test results, evaluating the performance of the modified side structures. Referenced reports are listed in Section 7. Appendices to this report completely document the test data and specific test conditions. Results of related component tests of door beam structures and interior protective materials are also included in Appendices.

2. *CONCLUSIONS AND RECOMMENDATIONS*

The following conclusions and recommendations resulted from the research described in this report.

2.1 *Conclusions*

Modifications of conventional full-size automobile side structures were developed that demonstrated marked improvement in structural crashworthiness through a broad range of side impact conditions, as compared to conventional (unmodified) vehicle performance.

These modifications involved redesign of body and frame structural components and sub-assemblies to provide increased lateral occupant compartment strength and side structure energy dissipation capability. Major components affected were the side pillars, doors, roof, and the 3rd and 4th frame cross-members. These "side structure" modifications were designed to be completely compatible with front structure modifications developed by Calspan in a parallel effort. Weight increases related to body and frame modifications were on the order of 200 lbs. and 75 lbs., respectively, for a total net increase not exceeding 275 lbs. However, a large part of this weight increase (about 150 lbs.) related to multipurpose modifications also functional in frontal and rollover collisions.

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For *perpendicular* side impact conditions, structural modifications substantially increased intrusion resistance of the passenger compartment for nominal 30 MPH and 45 MPH collisions by conventional and modified front structure striking vehicles.

The following comparisons of static intrusion at locations near the front and rear door centroids indicates the magnitude of lateral intrusion reduction:

* * *

APPENDIX F — OPINION LETTER FROM NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION DATED JANUARY 5, 1981 WITH ENCLOSURE

U.S. Department
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Jan. 5, 1981

NOA-30

Mr. Daniel L. Thistle
Beasley, Hewson, Casey,
Colleran, Erbstein & Thistle
5th Floor
21 South 12th Street
Philadelphia, PA 19107

Re: *Dawson v. Chrysler Corp.*

Dear Mr. Thistle:

This responds to your letter of December 24, 1980, concerning whether the Federal motor vehicle safety standards establish design criteria and whether compliance with those standards constitutes a defense in a product liability suit.

As explained below, Federal motor vehicle safety standards allow manufacturers latitude to develop a variety of designs to comply with the performance requirements set in the standards. In addition, compliance with a Federal motor vehicle safety standard does not constitute a defense in a product liability suit.

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Section 102(2) of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1391(2)) defines a motor vehicle safety standard as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provide objective criteria," Section 103(f) (15 U.S.C. 1392(f)) of the Act also requires a standard to be "reasonable, practicable and appropriate for the particular type of motor vehicle . . . for which it is prescribed."

Each of our safety standards meets the need for motor vehicle safety by specifying requirements for the performance of a particular vehicle system or item of equipment. For example, Standard No. 214, *Side Door Strength,* cited in your letter, sets certain crush resistance requirements that a passenger car must meet in static load test. It does not require the use of a specific design. Thus, manufacturers need not use the most effective design available. They may use any design that will satisfy the performance requirements of the standard.

It also does not require that manufacturers limit their chosen design to the performance levels specified in the standard. The performance requirements are minimum, not maximum, ones. Manufacturers are free to select designs which exceed those in the safety standards.

Although our safety standards meet the need for safety, they do not necessarily attempt to solve the full extent of a particular safety problem. The static test requirements of Standard No. 214 are a prime example. Compliance with those requirements has yielded some significant benefits. However, large numbers of persons continue to be killed or seriously injured in side impact crashes. Accordingly, the agency issued an advance notice of proposed rulemaking (44 FR 70204; December 6, 1979) to

explore the possibility of replacing the existing laboratory tests with dynamic tests that simulate actual side crashes. (A copy of the notice is enclosed.)

In recognition of the foregoing factors, Congress has provided that compliance with a safety standard does not constitute a defense in a product liability suit. Section 108(c) (15 U.S.C. 1397(c)) of the Act provides that compliance with a motor vehicle safety standard "does not exempt any person from liability under common law." The House Report (H.R. Rep. No. 1776, 89th Cong. 2d Sess. (1966)) on section 108(c) states that, "It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability."

Likewise, compliance with a Federal motor vehicle safety standard does not presumptively mean that the design chosen by a manufacturer is safe. Congress gave the agency the authority to order manufacturers to notify owners about safety-related defects in their vehicles and to remedy those defects (15 U.S.C. 1411-1420). On occasion, the agency has required manufacturers to conduct defect notification and remedy campaigns even though the vehicle complied with applicable Federal motor vehicle safety standards. For example, the 1968 and 1969 Ford Mustangs and Cougars complied with the performance requirements set in Standard No. 207, *Seating Systems*. Because the seat back brackets in those seats experienced numerous failures in actual performance that affected the ability of the driver to control the vehicle, the agency ordered the recall of those vehicles.

Finally, the agency's interpretation letter of November 3, 1978, cited in your letter, does not interpret section 108(c) of the Act.

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The letter, a copy of which is enclosed, involved the issue of whether a California motor vehicle regulation was preempted under section 103(d) (15 U.S.C. 1392(d)) of the Act by a Federal motor vehicle safety standard. Section 103(d) is limited to the effect of Federal standards on State regulations covering the same aspects of performance. Section 108(c) of the Act governs the effect of Federal standards on product liability suits.

Sincerely,

s/ Frank Berndt
Frank Berndt
Chief Counsel

Enclosures

Appendix F

N40-30 (RBD)
11/8/73

Mr. W. Pudinski
Commissioner
Department of California
Highway Patrol
P.O. Box 898
Sacramento, California 95804

Dear Mr. Pudinski:

This is in response to your letter of October 1, 1973, in which you asked that we review an enclosed opinion by the California Attorney General on the question of preemption of California motor vehicle regulations by Federal standards. The opinion concluded that the California requirements that motorcycles be wired so that their headlamps are lit whenever their engines are running was not preempted. This conclusion was contrary to the position taken in an NHTSA letter of November 14, 1972, to Mr. Edward Kearney.

We adhere to the position stated in the November 14, 1972, letter that the California requirement is preempted, and consider the legal opinion by the California Attorney General to be an erroneous view of the Federal law.

The opinion properly viewed the question as turning on the application of the phrase in §103(d) of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1392(d), "applicable to the same aspect of performance." If the Federal standard (Standard No. 108, 49 CFR 571.108) covers a given aspect of performance, any State requirement must be identical to it. The California opinion relied on the language in the main opinion of one of the Super Lite cases, *Chrysler Corp. v. Tofany*, 419 F.2d 499 (1969),

that preemption should be "narrowly construed", and went on to find that since Standard 108 does not specifically address the matter of wiring the headlamps when the engine is running, that aspect of performance is not covered by the standard and the California law is valid.

More important, however, than the nebulous concept of whether preemption is "narrowly" construed (a concept with which Judge Friendly, concurring in *Chrysler*, did not agree) is the point made at the end of the main opinion, that the administering Federal agency was supporting the State's position regarding the scope of the Federal regulation. The Court quoted the U.S. Supreme Court in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276 (1969):

> [W]hen construing an administrative regulation, 'a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'

In this case the situation is the opposite of that in the Super Lite cases. The NHTSA's position is that the standard does cover the aspect of performance in question. As stated in the NHTSA letter of November 14, 1972, the standard "establishes requirements for motorcycle headlighting, along with special wiring requirements for motorcycles and other vehicles." It is the intent of the NHTSA that its requirements for headlamp performance, configuration, and wiring cover all aspects of performance directly involving headlamps, and thus preempt any non-identical State standards relating to headlamps.

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The implication of the California opinion is that any mode of design or performance that is not expressly dealt with in the Federal standard is open to regulation by the States. Such a position is impractical, where the agency's intent is to have a comprehensive, uniform regulation in a given area. In order to preempt the field it would be necessary for a Federal agency to anticipate the imaginative regulatory impulses of future State agencies or legislatures and include in a standard such provisions as, "It is not required that motorcycle headlamps be wired to operate when the engine is running." Congress clearly intended the NHTSA to establish a single set of uniform standards to which manufacturers must comply, and that intent would tend to be defeated by the position taken in the California opinion. Federal regulation has a negative as well as a positive aspect: in determining that there should be certain requirements in an area, we also are deciding against imposing others. The only way to effectuate such a decision is to declare, as we have done here, that our regulation is intended to be exclusive, and to describe as necessary its outer limits.

The California opinion's factual comparison with the Super Lite cases is also inept. The Super Lite itself was a new type of lighting equipment, a supplementary lamp, for which Standard 108 contained no requirements. Headlamps, by contrast, are comprehensively regulated by the standard.

For these reasons, we conclude that the California requirement that motorcycle headlamps be wired to operate when the engine is running is preempted by Standard 108, and void.

While we feel constrained by law to so conclude, I want you to know that I have instructed my staff to consider the merit of

amending the Federal lighting standard to include the California requirement in 108.

Sincerely,

s/ James B. Gregory
Administrator

No. 80-1026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRYSLER CORPORATION,
Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,
Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Case Cited

Linn v. *United Plant Guard Workers,* 383 U.S. 53 (1966) 1, 2

Statutes Cited

15 U.S.C.:

Sec. 1392(d) 1, 2, 6-8

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Respondents.

PETITIONER'S REPLY BRIEF

This brief is submitted on behalf of Petitioner Chrysler Corporation in reply to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari ("Resp. Br.").

Respondents' arguments against granting certiorari are predicated upon a misstatement of the questions presented by the Petition. Petitioner has not, as respondents erroneously claim, argued that: (1) § 1397(c) of the National Traffic and Motor Vehicle Safety Act of 1966 (the "Act"), providing for liability at common law, should be declared unconstitutional; or (2) compliance with Federal Motor Vehicle Safety Standards is an absolute defense to liability at common law.

To the contrary, petitioner contends that the provision of the Act preserving liability at common law (15 U.S.C. § 1397(c)) must be construed *in pari materia* with the Act's explicit preemption provision (15 U.S.C. § 1392(d)), so as to avoid frustration of significant congressional objectives and imposition of undue burdens on interstate commerce. Respondents completely ignore the import of § 1392(d), and seek to divert the Court's attention from the significant federal questions raised in the Petition.

This Court has recognized in the past that when the availability of state common law remedies "interfere[s] with effective administration of national . . . policy," resolution of the competing interests "entails accommodation of the federal interest in uniform regulation . . . with the traditional concern and responsibility of the State to protect its citizens. . . ." *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 64, 57 (1966).

Although *Linn* involved concerns over national labor policy, the Court's rationale and approach to accommodating common law defamation actions with the congressional goal of achieving uniform regulation of labor relations apply with equal force to the instant action. In *Linn,* the competing state and federal interests were accommodated by limiting "the availability of state remedies."

Id. at 64. The Court imposed strict proof requirements on plaintiffs in common law libel actions to "minimize" the possibility of interference with the federal program and "to effectuate the statutory design with respect to preemption." *Id.* at 64-65. A similar approach is necessary in this case. In order to minimize the possibility of adverse consequences on the federal scheme of uniform vehicle safety regulation, the Petition for a Writ of Certiorari should be granted so the Court may define the proof requirements to be imposed on plaintiffs in common law actions involving aspects of vehicle performance that are specifically governed by federal standards.[1]

Unless this Court strikes an accommodation between § 1392(d) and § 1397(c) by requiring claimants in such common law actions to prove that a proposed alternative design would (1) comply with Federal Motor Vehicle Safety Standards, and (2) produce an overall crashworthy vehicle, the clearly articulated congressional objectives of establishing national uniformity in the regulation of vehicle performance standards and of promoting overall highway safety will be thwarted. Congress recognized this danger when it expressly provided in § 1392(d) that state safety standards are to be preempted when they are "not identical" to applicable federal standards.

In an effort to avoid squarely confronting the constitutional questions presented in the Petition, respondents not only distort those questions,[2] but also raise factual

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[1]Respondents inaccurately characterize petitioner's argument as urging an absolute bar to state common law actions involving defective automobiles. In fact, petitioner does not argue that the availability of state common law remedies should be limited where, for example, plaintiff's theory of liability is predicated upon a challenge to an aspect of vehicle performance not governed by federal regulations or where plaintiff's claim is based on breach of a manufacturer's express warranty.

[2] Respondents' misleading treatment of the questions presented by the Petition is reflected, in part, by their reliance upon Ap-

(Footnote continued on following page)

arguments that were either expressly rejected by the courts below or directly contradicted by the record.

I. The Design Standard in This Case, Established Without Proof of Compliance With Federal Safety Standards or Overall Crashworthiness, Undermines the Pervasive Federal Scheme of Uniform Vehicle Safety Regulation.

As the National Highway Traffic Safety Administration has made abundantly clear, the entire scheme of federal regulation of vehicle safety is premised on a coordinated effort to promulgate uniform mandatory regulations designed to promote overall crashworthiness. *See* Petition at 12 n.6. Permitting the jury in this case to establish a safety standard without considering proof of compliance with federal standards or overall crashworthiness seriously undermines the federal scheme.

Compliance with Federal Standards. Notwithstanding respondents' repeated protestations to the contrary (Resp. Br. at 7, 17, 23), there is no proof of compliance with federal standards in the record. In fact, the District Court expressly found that respondents "pointed to no expert testimony indicating the alternate design would meet federal standards. . . ." Resp. Br. at App. A, 4a. Nowhere in its opinion did the Court of Appeals reject this conclusion.[3]

(Footnote continued from preceding page)

pendix F to their brief, an opinion of Frank Berndt, General Counsel to the National Highway Traffic Safety Administration, elicited by respondents' counsel after the filing of the Petition. This document is not a part of the record and was created *ex parte* solely for inclusion in Respondents' Brief. It fails to address in any way the significant constitutional arguments that petitioner has raised. Petitioner has made a motion to strike this document on the ground that its submission was highly improper. *See* Petitioner's Motion to Strike, dated January 27, 1981.

[3] The fact that petitioner did not prove noncompliance cannot, as respondents imply, either establish such compliance by default or cure respondents' failure to meet their burden of proof on this issue.

Apparently recognizing the weakness of their position on this issue, respondents make the spurious argument that the alternative design was a "minor modification," which "obviously would have complied." Resp. Br. at 6. That no such inference can properly be drawn is evident. Increasing the weight and rigidity of a vehicle so as to meet the exigencies of one particular crash situation necessarily raises complex technological questions about whether the vehicle will continue to perform at federally-mandated safety levels in other types of accidents. *See* Petition at 12 n.6. The Court of Appeals recognized this problem and expressed concern that respondents may have compromised safety in one aspect of performance to gain benefits in another. *See* Petition at App. A, 25a-26a.

Overall Crashworthiness. Respondents do not question the necessity of proving overall crashworthiness; rather they state only that such proof was presented. This assertion is without foundation in the record. Respondents have been unable to point to the testimony of even a single witness to support the claim that the overall crashworthiness of their design was established at trial. In an effort to circumvent the important federal issues raised by this failure of proof, respondents direct the Court's attention to what they have disingenuously described as "federally sanctioned"[4] research studies. Despite respondents' claim to the contrary, these reports do not address the issue of the overall crashworthiness of their proposed design or its compliance with federal standards.

The reports in question are interim research studies involving a host of different tests performed on a variety of prototype vehicles of differing structural configurations.

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[4] These reports were not "federally sanctioned." *See* Resp. Br. at 7. Although prepared for submission to the Department of Transportation, the reports carry clear disclaimers that the opinions and findings expressed in the publications are those of the authors and not of the National Highway Traffic Safety Administration. Resp. Br. at App. D, 21a; App. E, 31a.

Those portions of the reports' "Summary" and "Conclusions and Recommendations" that have been excerpted in Appendices D and E to Respondents' Brief demonstrate that the findings refer, not to any single design, but rather to the whole "mix" of design changes used in the research. These included substantial modifications of side pillar, roof, and door structures (Resp. Br. at App. E, 32a-36a), none of which were ever alleged to be part of respondents' proposed frame design. Thus, it is highly inaccurate for respondents to state that the reports "specifically approved" their proposed alternative design or demonstrated its overall crashworthiness.[5] *See* Resp. Br. at 7.

II. Petitioner Properly Raised the Issue of Respondents' Failure to Prove Compliance With Federal Standards.

Contrary to respondents' assertion, neither the District Court nor the Court of Appeals ruled that petitioner "waived" its argument that respondents failed to prove their proposed alternative design would comply with mandatory Federal Motor Vehicle Safety Standards. In fact, this issue was properly raised in the District Court.

In its motion for a directed verdict at the conclusion of all the proof and again in its motion for judgment notwithstanding the verdict, petitioner contended that respondents had not presented proof of the existence of a safer, practicable alternative design so as to justify submitting the case to the jury. The District Court clearly recognized and in fact acknowledged that this argument

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[5] Notably, the District Court concluded that these reports had virtually no evidentiary significance. In ruling on Chrysler's contention that the reports had been improperly admitted, the District Court held that "[e]ven if erroneously admitted, the reports were such a small part of the expert testimony as to be harmless error within Rule 61." Court of Appeals Appendix for Appellant at 3570a.

encompassed the contention that respondents had failed to demonstrate compliance with federal standards. The District Court, in response to petitioner's motion for judgment notwithstanding the verdict, pointed directly to the issue of federal compliance: "Chrysler also argues that there is no evidence that plaintiff's alternative design meets federal standards, and therefore [the design] could not be the practical alternate that New Jersey law requires." Resp. Br. at App. A, 4a. Since the motion for judgment notwithstanding the verdict merely incorporated by reference the arguments made in the motion for a directed verdict (Court of Appeals Appendix for Appellant at 3542a), it is evident that the issue had already been brought to the trial court's attention.[6]

Moreover, the fact that petitioner did not seek to prove that respondents' alternative design was not in compliance with federal standards cannot logically be construed as a waiver of petitioner's argument to the District Court that the burden of proving such compliance rested squarely on the respondents as the parties proposing the alternative design.

Petitioner, citing § 1392(d) of the Act and the legislative history dealing with preemption, also raised the issue of compliance with federal standards in the Court of Appeals:

> Without evidence that the proposed alternative design meets the existing standards of the National

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[6] Petitioner's contention in the motion for a directed verdict was that respondents failed to establish that a "safer alternative design . . . was available within the limitations of cost, technology and marketability in 1974." Court of Appeals Appendix for Appellant at 3493a-94a. That this argument necessarily constituted a challenge to respondents' failure to prove compliance with federal standards is apparent when Chrysler's challenge is viewed in the context of the Act. Section 1397(a)(1)(A) provides that no automobile may be sold or even manufactured for sale unless it complies with federal safety standards. To be sure, an unmarketable automobile would not be a practicable alternative. Thus, an alternative design cannot be considered practicable unless it is shown to comply with federal safety standards.

> Highway Traffic Safety Administration, the court cannot impose a duty on a car manufacturer to manufacture such a vehicle.

Court of Appeals Brief for Appellant at 20. Nowhere in the opinion of the Court of Appeals is there any suggestion that this issue had not been properly raised in the District Court.

III. State Contract Law and the State Procurement Exception to the Preemption Provision of the Act Are Inapplicable to This Case.

Rather than confront and respond to the constitutional questions raised by petitioner, respondents take refuge in a specious claim that the judgment in this case was predicated upon a finding that Chrysler breached a contract to supply Pennsauken Township with police patrol cars providing a greater degree of occupant protection than ordinary Chrysler models. The contract alleged to have been breached purportedly arose from procurement specifications concerning the vehicle's crashworthiness. Respondents also argue that because of these specifications the Dawson vehicle falls within an exception to the preemption provision of the Act, which provides that a state or political subdivision may establish safety standards nonidentical to federal standards but only if they are "higher" standards and restricted to vehicles "procured for its own use." *See* 15 U.S.C. § 1392(d).

This exception is totally inapplicable to the Dawson patrol car: there was not a scintilla of evidence to indicate that the township had set any procurement standards, much less a "higher" standard, with regard to crashworthiness. Indeed, the District Court specifically rejected this argument and ruled as a matter of law that the procurement specifications for the vehicle included no special requirements for crashworthiness and that Chrysler made no rep-

resentations that the police patrol cars would be safer than ordinary passenger vehicles. Court of Appeals Appendix for Appellant at 3509a-11a. The District Court also explicitly rejected respondents' contentions that the township's specifications for the Dawson vehicle involved the "frame and structure of the car" or "included changes in structural members." *Id.* at 3560a, 3511a. The District Court concluded:

> Nothing represented by Chrysler could possibly be construed to mean the vehicle had a degree of crashworthiness greater than a normal car. * * * Plaintiffs simply cannot claim that the frame and support members of this vehicle were any different from that of a normal passenger vehicle.

Id. at 3509a, 3511a.

The factual predicate upon which respondents base their breach of contract theory has thus been entirely discredited by the District Court: no special procurement requirements relating to crashworthiness were ever proposed by the township; nor did petitioner ever make any representations in this regard. The conclusion is inescapable— petitioner and the Township of Pennsauken never entered into a contract including terms that would bring the Dawson vehicle within the state procurement exception of §1392(d). Plainly, respondents cannot now escape the purview of the explicit preemption provision of the Act by fatuously claiming a breach of a contract that never even existed.

IV. Review of the Important Federal Issues Presented in the Petition is Essential at This Time.

Respondents argue that "there is no compelling reason to grant certiorari" in this case. Resp. Br. at 30. To the contrary, substantial and troubling issues of national concern, starkly raised but left unresolved by the Court of Appeals, pose an alarming threat not only to the American

automobile industry but also to a pervasive scheme of uniform regulation designed to assure safety on the nation's highways. The impact of the result in this case has broad implications extending far beyond the special interests of this petitioner: hundreds of "second collision" cases have been filed across the country, and in each one, as the Court of Appeals indicated, individual juries applying varying laws in different jurisdictions will, in effect, set nationwide safety standards and thereby impose conflicting requirements on automobile manufacturers. This result, which is in utter derogation of congressional intent and violative of the express preemption provision of the Act, is not an inevitable concomitant of the federal scheme. Indeed, as petitioner has strongly urged, the provisions of the Act precluding the setting of nonidentical safety standards on the one hand, while retaining liability at common law on the other, can be judicially harmonized. The unfair and inefficient burdens engendered by this system of ad hoc standard-setting promote, as the Court of Appeals recognized, serious injury to a broad spectrum of important national social and economic goals.

CONCLUSION

For the reasons stated herein and in the Petition, a Writ of Certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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January 27, 1981.

No. 80-1026

In The

Supreme Court of the United States

October Term, 1980

CHRYSLER CORPORATION,

Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUR REBUTTAL BRIEF IN OPPOSITION TO REPLY BRIEF

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SUR REBUTTAL BRIEF IN OPPOSITION TO REPLY BRIEF

The lower courts specifically held that petitioner waived any argument with respect to compliance with federal standards.

Rule 22 of the Rules of the Supreme Court of the United States provides for supplemental briefs dealing with new cases or legislation or other intervening matters not available at the time

of the party's last filing. While the majority of the petitioner's Reply Brief simply restates its prior position which does not constitute intervening matter, petitioner's Reply Brief abuses the record. At page 5 of its Reply Brief, petitioner states:

> "Contrary to respondents' assertion, neither the District Court nor the Court of Appeals ruled that petitioner 'waived' its argument that respondents failed to prove their proposed alternative design would comply with mandatory Federal Motor Vehicle Safety Standards. In fact, this issue was properly raised in the District Court."

This is untrue. Chrysler never raised the question of compliance of respondent's alternative design during trial. There was no direct evidence or cross-examination on it. Chrysler did not raise the issue in its motion for a directed verdict. Chrysler did not submit a single point for charge on compliance with federal standards or take exception to the charge of the court for failure to include it. The first time Chrysler raised this argument was in its post-trial motions. The District Court, in response to this argument, held that Chrysler had waived it.

> "Defendant, during trial, failed to cross examine on this issue, nor did it introduce any evidence to demonstrate noncompliance. *It is too late for defendant to raise this argument.* The Court finds nothing in Cepeda to indicate that plaintiff's burden of production extends to this issue even *where a defendant does not raise it during trial.*" (Emphasis added.) (Opinion of District Court, 4a, Respondent's Brief.)

> "Chrysler also contends that the Court should

> have told the jury that an alternate design should have complied with Federal standards. This is proper jury argument, but there is no law compelling its inclusion in the charge. *Furthermore, defendant did not timely state an objection on this ground.* Federal Rules of Civil Procedure 51." (Emphasis added.) (Opinion of the District Court, 11a, 12a, Respondent's Brief.)

Rule 51, Federal Rules of Civil Procedure provides:

> "Rule 51. Instructions to Jury: Objection.
>
> After the close of the evidence or at such earlier time during the trial as the court reasonable directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The Third Circuit, in response to Chrysler's argument re an affirmative burden of proof, noted that there was no suggestion at trial that the alternative design did not comply with Federal Safety Standards (Petitioner's Brief, 16a).

Petitioner points to no testimony or record evidence where it raised this issue. Additionally, it cannot cite a federal

regulation which the alternative design (which is merely the addition of a cross-member to a Ford frame) purportedly violates. Chrysler made a conscious decision not to bring this issue to the attention of the trial court. Basic fairness and the Federal Rules of Civil Procedure preclude raising the issue on appeal.

CONCLUSION

In its Reply Brief, Chrysler narrows the essence of its petition to a request for this Court to set an additional affirmative burden of proof in a common law products liability suit. This issue was never properly raised in the lower court and accordingly may not be considered on appeal.

Respectfully submitted,

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF *AMICUS CURIAE*

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—0—

MOTION OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), pursuant to Rule 42 of this Court, respectfully requests leave to file a brief *amicus curiae* in general support of the petitioner, Chrysler Corporation ("Chrysler"). The petitioner has consented to MVMA filing such a brief, but the respondents have not consented.

MVMA is a trade association of United States automobile, truck and bus manufacturers whose member companies produce more than 99 per cent of all domestically built motor vehicles.

MVMA and its members have a real and vital interest in filing a brief *amicus curiae* in opposition to the decision below. That decision [presently reported as *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980)], while reluctantly affirming a judgment against Chrysler exceeding 2.5 million dollars, criticizes the existing arrangement whereby "individual juries in the various states are permitted, in effect, to establish national automobile safety standards." [630 F.2d at 953] The result, says the court, is a predictable "incoherence in the safety requirements set by disparate juries" as well as the possibility that a jury-established automobile safety standard will conflict with other important policies of national dimension. [630 F.2d at 953]

MVMA respectfully submits that the court below seriously erred in its conclusion that the enormous problems it perceived were "beyond the competence of this Court to resolve." [630 F.2d at 953] On the contrary, the complex public policy questions raised in the instant case (and hundreds of other similar suits now pending against MVMA member companies) speak to fairly common, classic and traditional constitutional issues often confronted by the federal courts: "preemption" and "burden upon interstate commerce."

The multi-million dollar judgment against Chrysler in the instant case stems from a relatively recent phenomenon in products liability law—the so-called automobile "crashworthiness," "second collision" or "enhanced injury" claim.[1] In such suits the contention is not that a defect

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[1] The judicial genesis for permitting "crashworthiness" claims to be tried is generally conceded to be the Eighth Circuit's decision in *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). See generally Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 Washburn L.J. 600 (1977); Hoenig & Goetz, *A Rational Approach To "Crashworthy" Automobiles: The Need for Judicial Responsibility*, 6 Southwestern U.L. Rev. 1 (1974) (also contains early discussion of "burden upon commerce" implications at pp. 59-65).

caused the accident but rather that a design or construction feature of the vehicle "enhanced," "aggravated" or failed to minimize the claimant's injuries to some extent. Invariably, such claims involve contentions that the car or the allegedly offending feature should have been made "safer" or "better" or "stronger" or "differently" in some way so as to mitigate injuries to some extent in some accident. Usually such suits involve testimony by experts for the claimant[2] that the car's performance was deficient or "defective" in some way and that some alternative design or feature would have been "better" for the claimant in such accident. The trial process results, as the Third Circuit admits, with the jury, in effect, "establishing" or "setting nationwide automobile safety standards" [630 F.2d at 953, 962] on an *ad hoc,* case-by-case basis with conflicting requirements being imposed upon manufacturers. Such requirements may be in possible derogation of legislative safety standards and of mandated or nationally desirable safety and energy objectives [630 F.2d at 953, 962-63].

The result is a clash of epic proportions between official state activity (in the form of conflicting court-allowed litigation and judgments regarding standards of automotive crash safety performance) and federally-mandated motor vehicle safety standards governing crash safety performance which Congress has declared must be nationally uni-

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[2] E.g., *Dawson* v. *Chrysler Corp.*, 630 F.2d at 954, 958, 960 (plaintiff's experts included a "design analyst," a "mechanical engineer" and a "biochemical engineer.") See also *Huddell* v. *Levin,* 537 F.2d 726 (3d Cir. 1976); *Dreisonstok* v. *Volkswagenwerk, A.G.,* 489 F.2d 1066 (4th Cir. 1974). Under Federal Rules of Evidence 703-705 a mere opinion by a paid expert may trigger a jury's ability to set crash performance standards in conflict with those mandated by the National Highway Traffic & Safety Administration ("Agency") after years of research and testing. See, e.g., *Stonehocker* v. *General Motors Corp.,* 587 F.2d 151, 158-59 (4th Cir. 1978) (jury question presented about roof crash performance standards even upon "thin testimony" of experts "in a field in which they had little knowledge").

form. Given the explicit provisions of the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") that states are proscribed from adopting safety standards "not identical" to the federal standards regulating the "same aspect of performance" [15 U.S.C. § 1392(d)] and an expressive legislative history, a major and novel "preemption" question is presented which should be reviewed and resolved by this Court.

Furthermore, since "crashworthy" claims, by their nature, involve contentions that a particular car crash could have been made "safer" or "better" in some way, each injurious collision could generate a potential lawsuit alleging that some car feature should have been made differently. Because of the inevitable frequency of accidents and possibility of high damage awards, the potential litigation exposure is staggering and the potential for adverse judgments is astronomical. Establishment by the states of conflicting, *ad hoc,* non-uniform crash performance safety standards via litigation presents a substantial question of an unconstitutional burden upon interstate commerce which should be reviewed and resolved by this Court.

Despite more than fourteen years of extensive Safety Act operation, this Court has only rarely reviewed the Act's enforcement[3] and never upon the constitutional issues posed here by conflict of jury-established crash performance standards with Federal Motor Vehicle Safety Standards. The decision below does not resolve these issues; it avoids them. It suggests that courts may not act to cure constitutional impediments. It prolongs a climate of uncertainty in which litigants may be encouraged to file frivolous, marginal, costly and time-consuming litigation based upon performance standards that may compete with national

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[3] See *Ford Motor Co.* v. *Coleman,* 402 F.Supp. 475 (D.D.C. 1975), *aff'd mem.,* 425 U.S. 927 (1976).

priorities. Furthermore, even were Congress to act, as suggested by the court below, it is arguable that any remedial action would not affect the hundreds of similar lawsuits currently pending against MVMA's member companies or which may be filed prior to any conceivable enactment.

In short, the problem is now clearly presented and the time is ripe for review. An economically-beleaguered industry and an energy-starved nation cannot afford the costs of astronomical verdicts if they are based upon prohibited standard-setting by the states. Accordingly, MVMA submits this brief as *amicus curiae* to urge this Court to accept review of this matter for the purpose of dissipating the confusion engendered by the decision below and to consider all policy ramifications bearing upon the constitutional issues.

WHEREFORE, it is respectfully requested that the MVMA be granted leave to file a brief *amicus curiae.*

Dated: New York, New York, January 19, 1981

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BRIEF *AMICUS CURIAE* OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.

Introduction and Statement of Interest of *Amicus Curiae*

The decision of the Court of Appeals in this proceeding recognizes a grave problem of national significance in automobile "crashworthiness" cases but opts against its resolution by courts because it is "beyond" their "competence" [630 F.2d at 953]. Instead, the court below, though finding that jury-established national automobile safety standards

lead to "incoherence in the safety requirements," potential "conflict with other policies" of national interest, and imposition on manufacturers of "conflicting requirements," is content to merely "bring the problem to the attention of the legislative branch" [630 F.2d at 963]. The court says that since Congress "designed this system" of "regulation by ad hoc adjudications," Congress is "best suited" to "change that system." [630 F.2d at 963]

MVMA's member companies, as automobile manufacturers, are directly threatened by the continuation of a climate of uncertainty in which jury-established standards conflict with federal standards or priorities and in which costly and time-consuming litigation leads to adverse multi-million dollar judgments. MVMA respectfully submits that the court below seriously erred. Issues of classic constitutional dimension are fully presented by the clash between federal safety standards, which Congress has unequivocally declared must be uniform, and *ad hoc* jury-established standards that vary from accident to accident and case to case. These issues of "preemption" and undue "burden upon interstate commerce" are properly to be resolved by the courts. Furthermore, the arrangement by which juries set national standards was *not* created by Congress. On the contrary, Congress expressly prohibited any state from establishing motor vehicle safety standards which are not "identical" to the federal standards [15 U.S.C. § 1392(d)]. The jury system of standard-setting emanates from and is tolerated by the courts. Therefore, it is proper for the courts to solve the "preemption" and "burden of commerce" questions. Finally, leaving the problem for Congress to solve at some uncertain point in the future would not affect the hundreds of similar lawsuits currently pending against MVMA member companies as well as those suits which would be filed prior to any congressional action.

The foregoing issues are very clearly presented because Congress has expressly proscribed non-"identical" state standards and an expressive legislative history amply reflects the federal objective of uniformity. The potential financial burden to manufacturers is substantial. Court-made damage awards are, according to prior decisions of this Court, a form of state activity that must comport with constitutional requirements. Accordingly, the issue is ripe for review by this Court upon full briefs of the litigants and interested parties.

It is evident that manufacturers other than Chrysler are materially affected by the nature of the precedent below and the Third Circuit's refusal to "grapple" with the serious problems it recognized. Manufacturers need to know in advance the performance standards with which they must comply because cars cannot be redesigned from accident to accident. Manufacturers spend millions of dollars on research and development, tooling, testing and quality control in order to comply with Federal Motor Vehicle Safety Standards promulgated by an expert agency. Such standards may take years to develop and formulate. Yet they may be contravened by a given jury in a two-week trial in which considerable time is spent upon "sympathy issues." States must not be allowed to indirectly establish, via litigation, those same inconsistent safety standards that they are forbidden by the Safety Act to establish directly. At the same time, the common law rights of injured consumers to recover for defects in products must be harmonized with national standards and policy objectives, congressional intent and constitutional requirements.

MVMA and its member companies have a real and vital interest in filing this brief *amicus curiae* in support of the petitioner since the effect upon the industry of the decision below is direct and immediate. However, also at stake is the public interest at large. The costs of huge verdicts and in-

consistent standards must ultimately be partially borne by the consumer. New automobiles that become prohibitively expensive may be denied to all except the affluent. Manufacturers who cannot sell cannot compete and bankrupted companies will result in loss of jobs, and severe impact upon related industries like parts and materials suppliers, franchise dealers and service stations. Thus, the significance of the issues transcends the bounds of the dispute between the litigants below. The nation and one of its key industries is vitally affected.

Accordingly, MVMA seeks leave to file this brief as *amicus curiae* in order to persuade this Court to fully consider and resolve the constitutional and policy questions avoided by the court below.

ARGUMENT

I.

Strict Tort Liability Judgments Based Upon Jury-Established Crash Safety Standards Inconsistent with the Safety Act are a Form of State Activity that Violate the Supremacy Clause.

The doctrine of "federal preemption" is rooted in the "Supremacy Clause," Article VI, Clause 2 of the United States Constitution. Once it is determined that the federal government has power to regulate in a given area, the key "preemption" question is whether Congress has exercised its legislative power in such a manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter. *Northern States Power Co.* v. *State of Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). This Court has indicated that the legal precedents do not provide a "rigid formula" or "exclusive constitutional yardstick" for deciding preemption cases. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Much "turns upon

the peculiarities and special features of the federal regulatory scheme in question." *Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973).

State activity raising constitutional or "federal preemption" questions most often takes the form of traditional lawmaking, *i.e.*, state statutes, regulations or municipal ordinances. *E.g., Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) (Washington statutes and regulations regarding the design, size and movement of oil tankers in waterway); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977) (California weight labeling statute and regulations); *Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (City ordinance forbidding jet aircraft from taking off during night hours). However, though less frequently reflected in the cases, state activity in the form of imposition of tort or common law liability may also violate the Constitution. Thus, for example, an award of damages may exceed a state's power just as well as specific state legislation. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959):

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

In *Garmon*, this Court held that damages awarded by California courts for activities amounting to a tort under state law conflicted with controlling federal regulation of labor activities and consequently the awards could not stand.

Nor is *Garmon* a mere isolated pronouncement. In *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), this Court held that a suit and judgment (including an award of damages) under Illinois' common law of unfair competition could not be used to prevent copying of unpatented articles since to do so would conflict with the federal patent laws. The patent system is one in which "uniform federal standards are carefully used to promote invention while at the same time preserving free competition" 376 U.S. at 230-31. Thus, a state may not extend the life of a patent beyond its expiration either directly (by legislation) or indirectly (by common law remedies):

> "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." 376 U.S. at 231.

Because of conflict with the federal regulatory scheme governing patents, the state may not prohibit copying of the article "or award damages for such copying" 376 U.S. at 233. The state's legal remedies were deemed intolerable despite the state's interest in minimizing potential confusion by the public as to the source of the articles. The two federal policies of uniformity and free competition are likewise found in the Safety Act.[4]

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[4] S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] *U.S. Code Cong. & Ad. News* 2709, 2720 ("centralized, mass production, high volume character" of the motor vehicle industry "requires that motor vehicle safety standards . . . be uniform throughout the country"); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) ("uniformity of standards" intended so that public and industry is guided "by one set of criteria rather than a multiplicity of diverse standards"); S. Rep. No. 1301, *reprinted in* [1966] *U.S. Code Cong. & Ad. News* 2709 ("exercise of Federal authority" can channel industry's creative energies and vast technology "into a vigorous and competitive effort to improve the safety of vehicles"); See also *Id.* at 2712 ("vigorous competition" in development and marketing of safety improvements "must be maintained").

Similarly, in *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966), this Court considered the clash between a civil action for libel under Michigan's law of defamation and the National Labor Relations Act. After analyzing the regulatory intent and balancing the state's interest in protecting its citizens from malicious libels, the Court concluded that a total bar of defamation claims was not necessary. Recovery of damages, however, was permissible only for *malicious* defamation. *Id.* at 65. The Court also prescribed the requirements of proof in such cases; declared the duty of the trial judge to reduce excessive awards; and prescribed a restrictive rule for punitive damage awards. 383 U.S. at 65-66. The state's common law remedies were thus only partially curtailed. However, the Court's power, under preemption principles, to limit or exclude the state's damage remedies entirely was clearly declared:

> "[I]f experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding. We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act." 383 U.S. at 67.

Thus, any "Supremacy Clause" clash between a state's strict tort liability remedies and federal policy in the Safety Act is properly before this Court for review and resolution.

Federal exclusion of state law is "inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963).

The imposition of "crashworthiness" tort liability pursuant to jury-established standards in a given case may

well involve a "physical impossibility" of compliance with the Federal Motor Vehicle Safety Standards ("FMVSS") promulgated under the Safety Act. For example, in *Gray* v. *General Motors Corp.*, 434 F.2d 110 (8th Cir. 1970), plaintiff sued for alleged negligence in failing to install a "pop-out" windshield in her automobile claiming that her injuries were aggravated when she was thrown through the windshield in a collision. Under FMVSS 212, however, the windshield mounting is required to be retained in a 30 mph forward crash into a rigid concrete barrier, a standard expressing the view that the windshield should not "pop-out." See 49 C.F.R. § 571.212. In such a case it would be a "physical impossibility" to comply with both the NHTSA's directive and the jury's *ad hoc* standard for that claim.

"Physical impossibility" might also obtain in a given case due to the intrinsic or inherent design characteristics of particular automobiles and component parts. For example, in *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974), plaintiff's experts claimed that a multipurpose van vehicle with a snub-nose and cargo carrying capacity in the rear should have been built like a 1966 Ford passenger sedan with a protruding engine in the front. Of course, such a standard, if adopted by some juries, could possibly eliminate such van vehicles and require the van-purchasing public to have only 1966 Ford-like passenger cars. Congress intended that this should *not* occur even when the Agency sets standards.[5] Similarly,

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[5] "In determining whether any proposed standard is 'appropriate' . . . the committee intends that the Secretary will consider the desirability of affording consumers continued wide range of choices in the selection of motor vehicles. Thus it is not intended that standards will be set which will eliminate or necessarily be the same for small cars or such widely accepted models as convertibles and sports cars, so long as all motor vehicles meet basic minimum standards." S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] *U.S. Code Cong. & Ad. News* 2709, 2714.

"physical impossibility" might arise from conflicting jury-established standards as to the same subject matter whereas the FMVSS prescribe a different performance standard.[6] Additionally, a form of "physical impossibility" or its functional equivalent (for example, prohibitive cost) might arise when compliance with a jury-imposed standard in a particular aspect of performance would require a redesign that would practicably cause another FMVSS to be violated or a change that could result in a significant danger to the safety of occupants in other kinds of accidents.[7] To illustrate, heavy and rigid bumpers or fenders may offer some protection against intrusion but they may prove disastrous to pedestrians struck by them. High seatback head restraints may offer some protection against "whiplash" but they may compromise rearward visibility. Brighter or higher intensity lamps may improve visibility at night but they may blind drivers in other cars. Rigid seats may prevent an occupant from moving rearwards in a rear-end crash but they may increase the injuries of rear seat occupants who strike them during a frontal collision. These

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[6] Thus, in *Seattle-First National Bank* v. *Talbert*, [1970-1973] Prod. Liab. Rep. (CCH) ¶ 6550 (Wash. Super. Ct. 1970) and *Baumgardner* v. *American Motors Corp.*, 83 Wash.2d 751, 522 P.2d 829 (1974), vehicles were claimed to be "uncrashworthy," because, among other things, the seats remained rigidly anchored during the collision and failed to yield. In *Walton* v. *Chrysler Corp.*, 229 So. 2d 568 (Miss. Sup. Ct. 1969) and *Volkswagen of America, Inc.* v. *Young*, 272 Md. 201, 321 A.2d 737 (1974), on the other hand, the claim was that the design was "uncrashworthy" because the seats gave way in the collision. Under FMVSS 207, seats must withstand a certain force under prescribed test conditions and then are permitted to yield. 49 C.F.R. § 571.207.

[7] An example of the former is the "pop-out" windshield illustration discussed earlier. Another such example would be a claim that a fuel tank in a given location should be positioned elsewhere to be safer in a particular kind of accident but where such a relocation would make it practicably difficult to comply with the FMVSS that requires fuel tank integrity to be maintained in multiple test collisions from the front, rear and side. See 49 C.F.R. § 571.301-75.

An example of the latter is a claim that the body structure should

and many other engineering conflicts may create some "physical impossibility" of complying with both a federal standard and a jury-imposed standard.

Even if "physical impossibility" is not present, there may be preemptive effect by the federal scheme of regulation. Thus, if Congress manifested an intent "to displace coincident state regulation in a given area," the state activity may be excluded. *Northern States Power Co.* v. *State of Minnesota, supra,* 447 F.2d at 1146. In the Safety Act, Congress stated [15 U.S.C. § 1392(d)] that no state may establish "any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."[8] If a state proceeded to violate Section 1392(d) directly by creating standards that were not "identical" to the federal standards, there would be no question that the state requirement could not stand. Similarly, the state may not accomplish indirectly (via tort remedies in the courts) what it may not

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be made more rigid to prevent intrusion of the passenger compartment but where added rigidity might increase accelerations upon the body, decrease energy absorption and create a more "aggressive" and "hostile" automobile to other cars on the road. Such an issue was partially presented in *Dawson* [see 630 F.2d at 959.] A 1974 report by Columbia University's School of Engineering and Applied Science assessing the advantages and disadvantages of Experimental Safety Vehicles ("ESV") is illustrative of the dangers of "beefing up" some cars at the expense of others. The authors conclude that the heavier ESV's would be more "aggressive" to cars on the road so that "a disastrous effect is not inconceivable." Tien & Testa, *Critical Assessment of Social and Economic Implications of Safety Cars,* 28 (August 1974). See also *Id.* at 95 (aggressiveness of heavy safety vehicles would actually increase traffic deaths for several years).

[8] The Safety Act makes an exception in the case of vehicles or equipment procured for a state's own use. As to such vehicles the states may establish requirements imposing "a higher standard of performance." [15 U.S.C. § 1392(d)]

accomplish by legislation. A state's activity via court judgments for damages is subject to the same constitutional scrutiny and limitations as traditional lawmaking. *Linn* v. *United Plant Guard Workers, supra,* 383 U.S. 53; *Sears Roebuck & Co.* v. *Stiffel Co., supra,* 376 U.S. 225; *San Diego Building Trades Council* v. *Garmon, supra,* 359 U.S. 236.

Where Congress has not expressly prohibited dual regulation or unequivocally declared its exclusive authority over a particular subject, federal preemption may still be *implied.* Key factors in such a determination are said to be (1) the aim and intent of Congress as revealed by the statute and legislative history; (2) the pervasiveness of the federal regulatory scheme as reflected in the legislation and as carried into effect by the agency; (3) the nature of the subject matter regulated and whether it demands "exclusive federal regulation in order to achieve uniformity vital to national interests;" and (4) whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Northern States Power Co.* v. *State of Minnesota, supra,* 447 F.2d at 1146-47.

Even if congressional intent in the Safety Act were not manifest (which it is in 15 U.S.C. § 1392(d)), implied preemption could be justified on the basis of the factors enumerated above. First, both the statute and legislative history make it clear that *uniform,* national safety standards were Congress' goal. Second, the pervasiveness of the federal regulatory scheme is reflected in the scope and breadth of the Safety Act and safety standards promulgated thereunder.[9] Moreover, the Agency carrying out the regulatory

[9] See 49 C.F.R., Part 571 which contains many FMVSS relating to safety windshields, padded dashboards, safety restraints and seat belts, safety door latches, energy-absorbing steering wheels and columns, break-away rear view mirrors, occupant protection, side door strength, seat strength, roof strength, fuel tank integrity and many others.

scheme spends many millions of dollars annually to conduct research, testing, compliance, enforcement and recall activities.[10] The subject matter is certainly one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests."[11] *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra,* 373 U.S. at 143-44; *San Diego Building Trades Council* v. *Garmon, supra,* 359 U.S. at 241-44. Finally, if conflicting jury-established standards vary from case to case and possibly conflict with national safety and energy policy and federal safety requirements, then the state laws "stand as obstacles" to accomplishment "of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra,* 312 U.S. at 67. Thus, regardless of whether the preemptive effect is deemed "express" or "manifest" [*see* 15 U.S.C. § 1392(d)] or "implied," the result is the same. The proscribed state activity must yield in whole or in part.

A holding of Safety Act preemption is not impeded by 15 U.S.C. § 1397(c) which provides:

> "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

The plain reach of this provision is simply to declare that common law liability is not excused merely because of compliance with a safety standard. Stated simply, compliance is not a defense that vitiates liability as a matter of law. The subsection, however, does *not* mean that states can act, via

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[10] For fiscal year 1981 NHTSA requested over 355 million dollars from Congress of which $52.3 million was for traffic and motor vehicle safety programs. See BNA, Product Safety & Liability Rptr. 110 (Feb. 1, 1980).

[11] See S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] *U.S. Code Cong. & Ad. News, supra,* at 2712, 2715, 2720.

common law doctrines, to frustrate the national policy against non-identical standards in a particular aspect of performance. To reason otherwise would require a conclusion that Congress' express prohibition in Section 1392(d) could simply be undone via Section 1397(c)—an absurdity.

The legislative history does not reveal any sanctity attached to common law remedies strong enough to either defy or nullify the express congressional intent to have federal uniform standards preempt non-identical state standards. On the contrary, the legislative history reveals a very limited reach for Section 1397(c). Thus, the Senate Report states that the federal safety standards "*need not* be interpreted as restricting State common law standards of care. Compliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 1301, *reprinted in* [1966] *U.S. Code Cong. & Ad. News, supra,* at 2720 [Emphasis supplied]. The House Report states that compliance "is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966). The gist of these pronouncements is merely to preclude an automatic defense. *See Stonehocker* v. *General Motors Corp.,* 587 F.2d 151, 156 (4th Cir. 1978) (Section 1397(c) prevents exemption from negligence because of compliance); *Roberts* v. *May,* 41 Colo. App. 82, 86, 583 P.2d 305, 308 (1978) (standards are statutory minima and not conclusive as to manufacturer's liability).[12]

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[12] Cases considering the threshold question whether there is a common law *duty* to provide a "crashworthy" vehicle in the first place have referred to 15 U.S.C. § 1397(c) as an indication that regulation under the Safety Act was supplementary to the common law of products liability and that courts were therefore not powerless to act or impose such a legal duty upon manufacturers. E.g. *Arbet*

It must be remembered that in 1966 Congress could hardly have intended imposition of common law "crashworthiness" liability by precluding compliance as a defense because such actions were not yet permitted by the courts. See *Evans* v. *General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993, 999 (D.C. Cir. 1976). The Safety Act was passed just a few months after *Evans* was decided and well before the *Larsen case.*

Congress obviously was intent upon preserving the common law remedies which then existed—not upon creating new legal theories of liability.[13] When analysis of legislative history ensues to determine whether preemption by Congress was intended, the time frame of the legislative consideration is highly significant. *See Perez* v. *Campbell*, 402 U.S. 637, 654-56 (1971). (Earlier congressional intent harmonized as based upon older legal precedents). Con-

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v. *Gussarson*, 66 Wis. 2d 551, 562, 225 N.W.2d 431, 438 (1975); *Volkswagen of America, Inc.* v. *Young*, 272 Md. 201, 218, 321 A.2d 737, 746 (1974); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993, 999-1000 (D.C. Cir. 1976). These pronouncements simply state that courts may declare legal doctrines notwithstanding legislative activity under the Safety Act. They do *not* stand for the proposition that courts (or juries) may adopt, establish or impose performance standards which are not "identical" to the federal standards. State court activity to that effect could fare no better than state legislative activity because of the prohibition contained in 15 U.S.C. § 1392(d).

[13] Consider the statement of Rep. Dingell on the Floor of the House of Representatives:

> "Second, we have preserved every single common-law remedy *that exists* against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of the common law *which are afforded* to the purchaser, *remain* in the buyer, and they can be exercised against the manufacturer." 112 Cong. Rec. at 19663 (1966) [Emphasis supplied.]

gress could not possibly have intended to forcefully prohibit non-identical state standards of crash performance and yet allow such standards to be imposed via state common law remedies which had not yet been created.

In any event, 15 U.S.C. § 1397(c), by its terms, merely precludes a *per se* defense to a lawsuit. Section 1392(d), on the other hand, prohibits imposition of a state standard that is not "identical." The subsections are not mutually exclusive nor do they cancel each other out; at best, they must be construed *in pari materia.*

Although sufficient precedent exists to consider totally curtailing state tort awards because of federal preemption,[14] this Court may fully wish to consider whether at least a partial curtailment is necessary. *See Linn* v. *United Plant Guard Workers, supra,* 383 U.S. at 67.[15] In any event, the "preemption" issue is squarely presented and ripe for review by this Court upon full briefs of the litigants and interested parties. Therefore, the petition should be granted.

II.

Strict Tort Liability Judgments Based Upon Jury-Established Crash Safety Standards Inconsistent with the Safety Act are a Form of State Activity that Unduly Burden Interstate Commerce.

As indicated above, state authority, whether manifested through the legislature or the courts, is subject to the limitations which the United States Constitution places upon state

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[14] *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966).

[15] In *Linn*, the Court majority held that partial curtailment could limit libel suits to those based upon malice. Four dissenting Justices,

action. An award of damages can exceed a state's power just as well as specific legislation. See pp. 10-12, *supra.*[16] Thus, strict tort liability remedies based upon *ad hoc,* conflicting, non-uniform standards may substantially burden interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.[17] The burden is potentially twofold: first, foreign and interstate commerce is materially affected in an area where uniformity is indispensable; second, an undue financial burden is placed upon interstate commerce.

It is settled that states have no authority to regulate those phases of national commerce which, because of the

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however, urged total curtailment of state-allowed lawsuits. One possible approach to harmonizing Safety Act objectives with products claims is to limit "crashworthiness" lawsuits to those based upon *negligence* and to curtail those suits based upon "strict tort liability." In negligence cases the jury's inquiry is whether there was an exercise of "reasonable care." *Compare,* strict tort liability theory where the manufacturer may be held liable even if he "has exercised all possible care in the preparation and sale of his product." Restatement (Second) of Torts § 402A (1965). In fact, the trial court in *Dawson* instructed the jury that Chrysler could be held liable despite its exercise of "all possible care." [Transcript at pp. 3442a-43a]. Such a charge invites juries to look beyond the federal standard as to the same "aspect of performance" and to establish their own non-"identical" standard, a result in direct conflict with 15 U.S.C. § 1392(d). It also magnifies the prospect of reaching a "physical impossibility" form of clash with federal standards. See pp. 13-15, *supra.*

[16] In *Morgan* v. *Virginia,* 328 U.S. 373, 379 (1946), the Court acknowledged that a "final court order" may be an invalid burden on interstate commerce. In *Georgia* v. *Chatanooga,* 406 F.2d 830, 833 (6th Cir. 1969), the court observed that a writ of attachment may be an invalid burden upon commerce.

[17] Imposition of state liability by an invalid regulation upon interstate commerce is constitutionally impermissible. See *Western Union Tel. Co.* v. *Brown,* 234 U.S. 542, 547 (1914) (statute authorizing suits for mental anguish for failure to deliver telegraph messages invalid); *Michigan Public Utilities Comm'n* v. *Duke,* 266 U.S. 570, 577 (1925) (statute imposing "strict liability" of a common carrier upon private carrier burdened commerce).

need of national uniformity, demand that their regulation be prescribed by a single authority. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945) (length of a train not subject to state regulation); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959) (state requirements requiring trucks to be equipped with contour mudguards held invalid); *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429 (1978) (state regulations restricting lengths of trailer trucks operated on state highways invalid). Even when the state acts in the interest of safety, the Commerce Clause may proscribe the state activity. *Bibb* v. *Navajo Freight Lines, Inc., supra,* 359 U.S. 520; *Raymond Motor Transportation, supra,* 434 U.S. 429.

Congress has declared in its reports accompanying the Safety Act that uniformity of FMVSS is indispensable.[18] Such standards are to apply nationwide; non-identical standards in the same aspect of performance are forbidden. 15 U.S.C. § 1392(d). Thus, unlike cases in which a need for uniformity must be implied from the circumstances, here we deal with *explicit* recognition that uniformity is indispensable.

As to the "financial burden" factor, if the burden imposed on commerce is "clearly excessive in relation to the putative local benefits" it is an "undue" burden and invalid. *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The primary "local benefits" involved in the application of a states tort remedies are to compensate for injuries wrongfully sustained. However, such state benefit is not inconsistent with congressional intent to have uniform standards and the prohibition against non-"identical" standards in the "same aspect of performance." The FMVSS are

[18] S. Rep. No. 1301, *reprinted in* [1966] *U.S. Code Cong. & Ad. News, supra,* at 2720; H.R. Rep. No. 1776, 89th Cong., 2d Sess., *supra,* at 17. For textual excerpts, see n. 4 *supra.*

statutorily required to "meet the need for motor vehicle safety" [15 U.S.C. § 1392(a)]. The statutory definition of "motor vehicle safety" is a "performance" of the vehicle or equipment in a manner so that the public is protected against the "unreasonable risk of accidents occurring" and against the "unreasonable risk of death or injury to persons in the event accidents do occur." [15 U.S.C. § 1391(1)]. Thus, a compliance with federal standards in a particular "aspect of performance" satisfies at least the minimally-prescribed requisites of protecting against "unreasonable risks." However, when a jury is instructed that it may virtually "establish" its own standard as to the same aspect of performance by imposing liability despite the manufacturer's "exercise of all possible care,"[19] the burden placed upon the manufacturer reaches a level that cannot practicably be discharged regardless of the expenditure.

The financial burden of satisfying every conceivable jury-established standard that differs from the federal standard on a particular aspect of performance is prohibitive if not impossible. It is, for example, impossible to satisfy two different standards where a jury, in effect, says a windshield should "pop out" and an FMVSS says it should not "pop out" upon a collision. *Cf. Gray* v. *General Motors Corp., supra,* 434 F.2d 110; 49 C.F.R. § 571.212. The manufacturer bears the financial burden of complying with one performance criterion only to be possibly penalized by a huge verdict when he cannot comply with the other. Thus, a "strict liability" based solely upon a jury's own view of what the performance standard should be destroys

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[19] See Restatement of Torts (Second) § 402A (1965). In *Dawson,* the trial court instructed the jury that if they found the essential elements of New Jersey's form of "strict liability," then Chrysler "is liable even though you may find and believe that Chrysler exercised all possible care in the preparation and sale of its product." [Transcript at pp. 3442a-43a].

the uniformity deemed so indispensable by Congress. At the same time, the "incoherence in the safety requirements set by disparate juries" [630 F.2d at 953] or the conflict of the jury requirement with other national policies [*Ibid.*] imposes a further intolerable burden upon interstate commerce in financial terms. The "local benefit" of compensating a wrongfully injured party is thus "clearly exceeded" by the burden of liability despite a manufacturer's exercise of "all possible care."

As stated by the Third Circuit below in the instant case:

> "It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents." 630 F.2d at 962.

Since the verdict and judgment exceeding $2.5 million in *Dawson* is a reflection of potential "crashworthiness" exposures in a given suit, the financial burden is obviously enormous. The damages here involved, coupled with the frequency of injurious accidents potentially giving rise to claims in which jurors apply their own version of safety standards, is astronomical. The cost of the potential liability, whether borne through insurance premiums, the price mechanism or directly from a company's operating funds, is an economic consequence of such magnitude as to justify Commerce Clause scrutiny by this Court. As time goes by, more and more "crashworthiness" claims are filed and the financial burden continues to grow. Accordingly, the time is ripe for review and resolution by this Court.

Conclusion

For the foregoing reasons, MVMA submits that a writ of certiorari should issue in this case and that full review of the policy considerations be undertaken upon full briefs by the litigants and interested parties.

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Respectfully submitted,

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